

make fringe benefits available to any former employee. Whether a classification of former employees discriminates in favor of highly compensated employees will depend upon the particular facts and circumstances.

(4) *Restructuring of benefits.* For purposes of testing whether a particular group of employees would constitute a discriminatory classification for purposes of this section, an employer may restructure its fringe benefit program as described in this paragraph. If a fringe benefit is provided to more than one group of employees, and one or more such groups would constitute a discriminatory classification if considered by itself, then for purposes of this section, the employer may restructure its fringe benefit program so that all or some of the members of such group may be aggregated with another group, provided that each member of the restructured group will have available to him or her the same benefit upon the same terms and conditions. For example, assume that all highly compensated employees of an employer have fewer than five years of service and all nonhighly compensated employees have over five years of service. If the employer provided a five percent discount to employees with under five years of service and a ten percent discount to employees with over five years of service, the discount program available to the highly compensated employees would not satisfy the nondiscriminatory classification test; however, as a result of the rule described in this paragraph (d)(4), the employer could structure the program to consist of a five percent discount for all employees and a five percent additional discount for nonhighly compensated employees.

(5) *Employer-operated eating facilities for employees—(i) General rule.* If access to an employer-operated eating facility for employees is available to a classification of employees that discriminates in favor of highly compensated employees, then the classification will not be treated as discriminating in favor of highly

compensated employees unless the facility is used by one or more executive group employees more than a de minimis amount.

(ii) *Executive group employee.* For purposes of this paragraph (d)(5), an employee is an "executive group employee" if the definition of paragraph (f)(1) of this section is satisfied. For purposes of identifying such employees, the phrase "top one percent of the employees" is substituted for the phrase "top ten percent of the employees" in section 414(q)(4) (relating to the definition of "top-paid group").

(e) *Cash bonuses or rebates.* A cash bonus or rebate provided to an employee by an employer that is determined with reference to the value of employer-provided property or services purchased by the employee, is treated as an equivalent employee discount. For example, assume a department store provides a 20 percent merchandise discount to all employees under a fringe benefit program. In addition, assume that the department store provides cash bonuses to a group of employees defined under a classification which discriminates in favor of highly compensated employees. Assume further that such cash bonuses equal 15 percent of the value of merchandise purchased by each employee. This arrangement is substantively identical to the example described in paragraph (e)(2)(i) of this section concerning related fringe benefit programs. Thus, both the 20 percent merchandise discount and the 15 percent cash bonus provided to the highly compensated employees are includible in such employees' gross incomes.

(f) *Highly compensated employee—(1) Government and nongovernment employees.* A highly compensated employee of any employer is any employee who, during the year or the preceding year—

- (i) Was a 5-percent owner,
- (ii) Received compensation from the employer in excess of \$75,000,
- (iii) Received compensation from the employer in excess of \$50,000 and was

in the top-paid group of employees for such year, or

- (iv) Was at any time an officer and received compensation greater than 150 percent of the amount in effect under section 415(c)(1)(A) for such year.

For purposes of determining whether an employee is a highly compensated employee, the rules of sections 414 (q), (s), and (t) apply.

(2) *Former employees.* A former employee shall be treated as a highly compensated employee if—

- (i) The employee was a highly compensated employee when the employee separated from service, or
- (ii) The employee was a highly compensated employee at any time after attaining age 55.

Par. 16. Section 1.912-2 is revised to read as follows:

#### **§ 1.912-2 Exclusion of certain allowances of Foreign Service personnel.**

Gross income does not include amounts received by personnel of the Foreign Service of the United States as allowances or otherwise under the provisions of chapter 9 of title I of the Foreign Service Act of 1980 or the provisions of section 28 of the State Department Basic Authorities Act (formerly section 914 of title IX of the Foreign Service Act of 1946).

#### **PART 602—[AMENDED]**

Par. 17. The authority for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

#### **§ 602.101 [Amended]**

Par. 18. Section 602.101 (c) is revised by inserting in the appropriate places in the table "§ 1.61-2 . . . 1545-0771"; "§ 1.132-2 . . . 1545-0771"; and "§ 1.132-5 . . . 1545-0771".

Michael J. Murphy,

Acting Commissioner of Internal Revenue.

Approved: March 20, 1989.

Dennis Earl Ross,

Acting Assistant Secretary of the Treasury

[FR Doc. 89-15045 Filed 7-5-89; 8:45 am]

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## Part III

### Environmental Protection Agency

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40 CFR Part 131

Water Quality Standards for the Colville  
Indian Reservation in the State of  
Washington; Final Rule



# ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 131

[WH-FRL-3539-9]

### Water Quality Standards for the Colville Indian Reservation in the State of Washington

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** This rule establishes Federal water quality standards on the Colville Confederated Tribes Reservation located within the State of Washington. The standards consist of designated uses and criteria for all surface waters on the reservation.

**EFFECTIVE DATE:** August 7, 1989.

**ADDRESSES:** The public may inspect the administrative record for this rulemaking and all comments received on the proposed regulation at the Environmental Protection Agency, Region X, 1200 Sixth Avenue, Seattle, WA 98101 between the hours of 8:00 am and 4:00 p.m. on business days. A reasonable fee will be charged for copying. Portions of the record, including the correspondence and other actions cited in this rulemaking and written public comments will be available from the Criteria and Standards Division, OWRs, 401 M Street SW., Room 919 East Tower, Washington DC 20460, during usual business hours. Inquiries can be made over the phone by calling (206) 442-8293 or (202) 475-7315.

**FOR FURTHER INFORMATION CONTACT:** Fletcher Shives, Environmental Protection Agency, Region X (M/S 433), 1200 Sixth Avenue, Seattle, WA 98101, (206) 442-8293.

#### SUPPLEMENTARY INFORMATION:

Information in this preamble is organized as follows:

- A. Background
- B. Response to Public Comments
- C. Changes to the Proposed Rule
- D. Regulatory Flexibility Act
- E. Executive Order 12291
- F. Paperwork Reduction Act
- G. List of Subjects in 40 CFR Part 131

#### A. Background

On February 7, 1986, the Environmental Protection Agency received a request from the Colville Confederated Tribes to promulgate the Tribes water quality standards as Federal standards for waters of the reservation. Although Tribal standards had recently been adopted, the Tribe was concerned that their standards

were not Federally recognized under Clean Water Act ("CWA" or "the Act") section 303.

Section 303(c)(4) of the CWA authorizes the EPA Administrator to promulgate Federal water quality standards for waters of the Nation, including waters on Indian lands, whenever he determines a revised or new standard is "necessary to meet the requirements of the Act." The CWA does not, by itself, authorize States to implement or enforce water quality management programs on Indian lands. In some cases a State may have authority to regulate the water quality of a particular Indian land because of a treaty or a Federal statute. Where State authority may be in doubt, it may be appropriate for EPA to promulgate Federal water quality standards for waters on Indian lands.

Subsequent to receiving the request from the Colville Confederated Tribes, Congress passed the CWA amendments of 1987. These amendments established in the Act a new section 518 which addresses the issue of water quality standards on Indian lands and directs EPA to promulgate regulations specifying how Indian Tribes shall be treated as States for purposes of the water quality standards program. Despite the pending opportunity to qualify to be treated as a State for purposes of water quality standards, the Colville Confederated Tribes, in commenting on the proposed rulemaking, expressed enthusiastic support for EPA's action to promulgate Federal water quality standards for the reservation.

EPA is in the process of responding to the Section 518 directive to specify how Indian Tribes shall be treated as States for purposes of water quality standards. If, after promulgation of the regulations pursuant to section 518, the Colville Confederated Tribes qualify for the standards program and submit standards which are approved by EPA, EPA will withdraw these Federal water quality standards at the Tribes request.

EPA notes that today's rule does not establish a precedent for future EPA promulgations. This promulgation action is unique because: (1) It was initiated before the 1987 amendments to the Clean Water Act were enacted, and (2) it is based on water quality standards previously developed by the Colville Confederated Tribes for application to waters on their reservation. This process is not intended as a model for other reservations. Where other Indian Tribes wish to establish standards under the CWA, EPA would expect such Tribes to apply, under the CWA section 518 regulation, to be treated as States for

purposes of water quality standards. Once recognized by EPA as qualified to be treated as States, such Tribes would be responsible for developing their own water quality standards under the Act and making ongoing refinements to suit particular Tribal needs.

Indian Tribes should not conclude from today's action that Federal promulgation is EPA's preferred method of establishing water quality standards on reservations. Historically, EPA's preference has been to work cooperatively with States on water quality standards issues and to initiate Federal promulgation actions only where absolutely necessary. EPA believes that this preference is consistent with the intent of the Act to provide States, and Tribes qualifying for treatment as States, with the first opportunity to set standards. Today's rule represents only the ninth Federal promulgation of water quality standards to be completed by EPA. Six of the eight completed Federal promulgations have been withdrawn. Tribes should also note that Federal promulgation of water quality standards is a very deliberate process. In the case of today's rule, it took EPA more than three years (from the time of the request by the Colville Confederated Tribes until today's final action) to promulgate final water quality standards.

The CWA amendments of 1987 also added new section 303(c)(2)(B), which requires that States "shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act for which criteria have been published under section 304(a), the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses." As part of the proposed rulemaking, EPA decided not to propose numeric criteria for section 307(a) pollutants for inclusion in the Colville reservation water quality standards.

In response to comments received on the proposed rulemaking, EPA considered promulgating today's rule as proposed and simultaneously proposing numeric toxics criteria for the reservation. EPA decided against this action primarily because there are no known or suspected sources of toxics on the reservation. The Colville Confederated Tribes report only one point source discharger on the reservation and no toxics discovered from that discharger. EPA is aware of no other sources or potential sources of toxics in the area. Although the State of Washington has adopted twenty numeric toxics criteria for the protection of aquatic life, and the State and the



Tribes have an agreement to maintain consistent standards on common bodies of water, EPA is not a party to this agreement. For the reasons stated above, it is EPA's judgment that toxics criteria should not be proposed at this time.

This decision does not preclude the Tribes from amending their own water quality standards to include toxics criteria. Tribal adoption would allow the Tribes to develop any associated monitoring capabilities or otherwise make arrangements for such monitoring without EPA intervention.

Until numeric toxics criteria are adopted by EPA (or by the Tribes if they qualify for treatment as a State for purposes of the standards program) in response to additional information substantiating the need for numeric toxics criteria, EPA will use the Agency's 304(a) criteria guidance to implement the narrative toxics "free from" criterion in any situation that might arise concerning the discharge of toxics.

EPA believes this decision is appropriate, under the present circumstances, and that it is consistent with CWA section 303(c)(2)(B) and EPA's Indian Policy. This decision was made after careful consideration of the available information and the somewhat transitional nature of water quality management on the reservation (i.e., the pending CWA section 518 regulations). The decision not to adopt numeric toxics criteria for the reservation should not be interpreted as a general reluctance on the part of the Agency to adopt numeric toxics criteria, nor does it preclude proposing such criteria in the future.

Additional background information can be found in the proposed rulemaking, which appeared in the *Federal Register* on July 15, 1988 (53 FR 26968). Public comments on the proposal were invited until September 13, 1988. A public hearing was held August 18, 1988 on the Colville Indian Reservation in Nespelem, Washington. Fourteen people attended this hearing. EPA received four letters and statements on the proposal.

#### B. Response to Public Comments

Comments on the proposed rulemaking were received from the Colville Confederated Tribes, the Puyallup Tribe, Cavenham Forest Industries, Inc., and the State of Washington Department of Ecology (DOE). These comments and EPA's responses are presented below.

One commenter strongly suggested that EPA should withdraw the proposed rule. The commenter asserted that it is unnecessary for EPA to promulgate

water quality standards under section 303(c)(4)(B) of the Act because the State of Washington has already adopted and implemented standards for the reservation. The commenter contested EPA's assertion that the Act does not authorize States to implement or enforce their water quality standards on Indian lands. The commenter cited section 510 of the Act as evidence that the Act does not preempt state jurisdiction.

EPA disagrees with this analysis. Under accepted principles of Federal Indian Law, State authority to regulate activities on Indian lands is generally preempted absent an explicit Congressional statute to the contrary. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083, 1092 and n.18 (1987). The CWA contains no language which explicitly grants a State the authority to regulate activities related to water quality management on Indian lands. Section 510 of the Act clarifies only that the CWA does not preempt a State from adopting any water quality standard or effluent limitation more stringent than the Federal minima. *International Paper Co. v. Ouellette*, 107 S.Ct. 805 (1987). Section 510 does not, however, address the authority of a State to implement or enforce its water quality standards on Indian lands.

EPA construes the CWA in a manner very similar to the Resource, Conservation and Recovery Act (RCRA) with respect to Congressional authorization of State jurisdiction on Indian lands. As with the CWA, RCRA does not explicitly discuss or address the extent of a State's authority to regulate environmental activities on Indian lands. On this basis, EPA decided in 1983 not to authorize the State of Washington to regulate hazardous waste activities on Indian lands in the State (48 FR 34954 (1983)). EPA rejected Washington's argument that the statutory language of RCRA authorized the State's assertion of jurisdiction over Indian lands within the State. This decision was upheld by the U.S. Court of Appeals for the Ninth Circuit. *Washington Dept. of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985). The court found that, in light of Congressional silence, EPA had reasonably interpreted RCRA not to grant the State jurisdiction over activities on Indian lands. The court noted that EPA's interpretation was "buttressed by well-settled principles of Federal Indian law." *Id.* at 1469. As with RCRA, EPA rejects the argument that the CWA constitutes Congressional authorization of State regulatory jurisdiction over discharges to surface waters on Indian lands.

The same commenter also argued that the State retains inherent authority to regulate water quality on fee lands owned by non-Indians. This commenter asserted that EPA promulgation of water quality standards for the Colville reservation is unnecessary because the State of Washington has already established water quality standards which apply, at a minimum, over fee lands owned by non-Indians within the exterior boundaries of the reservation. EPA does not believe it necessary to resolve this issue. First, the Tribe and Washington have an agreement that water quality standards on and off the reservation will be as similar as possible. Also, the State of Washington, in a companion agreement with EPA, has already agreed that, in the absence of Tribal NPDES program assumption, EPA will issue all future NPDES permits on the reservation (without conceding its own authority to do so under State law).<sup>1</sup> As a result, to give effect to these agreements, EPA believes it necessary and appropriate to promulgate the standards contained in today's rule.

EPA notes that there may be some doubts as to whether the State of Washington would be able to adequately demonstrate its authority under State law to regulate activities affecting surface water quality on the Colville reservation in light of the relevant precedents regarding preemption of state regulatory authority on Indian lands.<sup>2</sup> As the commenter noted, the proper test for determining the extent of State regulatory authority was clearly stated by the Supreme Court in *Cabazon*.

State jurisdiction is pre-empted \* \* \* if it interferes or is incompatible with Federal and tribal interests reflected in Federal law unless the State interests at stake are sufficient to justify the assertion of State authority. The inquiry is to proceed in light of traditional notions of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.

*Cabazon*, 107 S.Ct. at 1092 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-35 (1983)). EPA believes that the adoption of section 518 of the CWA evinces strong Congressional preference for Tribal

<sup>1</sup> A copy of both cooperative agreements is available in the docket for today's rule.

<sup>2</sup> EPA has also determined that the State of Washington cannot adequately demonstrate its authority to regulate hazardous waste activities and underground injection activities on Indian lands in the State, and has declined to authorize Washington to administer these programs on Indian lands. See *Washington Dept. of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (hazardous waste); 53 FR 42,080 (1988) (underground injection).



control of water quality on Indian reservations, where the Tribe meets the statutory criteria. Thus, the Federal interest in ensuring enforcement of tribal water quality standards is strong and the continued applicability of the State standards may be subject to question. However, in light of the fact that both the Tribe and the State have "plac[ed] environmental protection ahead of jurisdictional conflicts in developing the (tribal water quality management) plan,"<sup>3</sup> EPA does not today attempt to finally resolve this question, nor does it feel that it must resolve this question before it can find that today's rule is necessary under section 303(c)(4)(B) of the CWA. Thus, EPA declines to do so.

Finally, this commenter argued that EPA may not promulgate these standards, since the Confederated Tribes of the Colville Reservation have not qualified to be treated as a State under section 518 of the CWA for purposes of developing water quality standards for EPA approval under section 303 of the CWA. EPA believes that the commenter may have misunderstood the statutory basis for today's action. Section 518(e) establishes statutory prerequisites that must be satisfied by a Tribe before it may submit water quality standards for approval by EPA under section 303. EPA is in the process of developing regulations to implement section 518 for purposes of the standards program, which it plans on proposing in the summer of 1989 for public comment. However, today's action is not an approval of Tribal standards under section 303(a)(3)(A), but Federal promulgation of standards under 303(c)(4)(B). Section 518 does not affect EPA's authority to promulgate Federal water quality standards.

The statutory context in which today's rule is adopted is very similar to the situation presented to the U.S. Court of Appeals in *Phillips Petroleum Co. v. EPA*, 803 F.2d 545 (10th Cir. 1986). In that case, Phillips challenged EPA's regulation promulgating a Federal Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA) for the Osage Mineral Reserve. Phillips argued that EPA lacked the authority to promulgate such regulations prior to the 1986 SDWA Amendments, which explicitly authorized EPA to promulgate Federal UIC programs on Indian lands. The

Tenth Circuit upheld EPA's regulations, stating that the strong national interest in applying SDWA regulatory standards "ocean to ocean" overcame Congress' failure to address the implementation of SDWA on Indian lands. *Id.*, at 553, 555-56. The Court also noted that its conclusion that "the SDWA empowered the EPA to prescribe regulations for Indian lands is also consistent with the presumption that Congress intends a general statute applying to all persons to include Indians and their property interests." *Id.* at 556. EPA believes that same logic applies to the CWA, both prior to and subsequent to the adoption of section 518.

EPA disagrees that today's action would be premature or inconsistent with the regulations to be developed under section 518. One commenter stated that adoption of section 518 supersedes EPA's 1984 Indian Policy statement and the cooperative agreements discussed above, which were adopted pursuant to the policy. EPA disagrees with this statement. Adoption of section 518 grew out of EPA's efforts to implement the CWA on Indian lands in a manner consistent with the 1984 policy. There is no legislative history to suggest Congress intended EPA to alter its 1984 policy; indeed it suggests the opposite. Furthermore, section 518(d) of the CWA explicitly authorizes States and Tribes to enter cooperative agreements "to jointly plan and administer the requirements of (the CWA)," precisely what the Tribe and the State have done.

EPA does not believe that today's action must wait for section 518 regulations to be finalized. The Confederated Tribes requested EPA to promulgate the Tribal water quality standards as Federal standards on February 7, 1986, nearly one year before passage of the Water Quality Act of 1987. EPA sees no reason to delay promulgation of this rule while regulations are developed under section 518. EPA notes that, in a draft of the regulations to be proposed under section 518 which has been made publicly available, Federal promulgation of standards on Indian lands is mentioned as one method of implementing the water quality standards program (although not the preferred method, as discussed above), where the Tribe is not yet able, or chooses not to qualify for treatment as a State and submit its own standards for approval. Consistent with the draft regulations, EPA believes that today's action is entirely consistent with section 518 of the CWA. EPA would also point out that if, after promulgation of the regulations authorizing Indian Tribes to develop water quality standards, the

Confederated Tribes of the Colville reservation qualify for the standards program and submit standards which are approved by EPA, EPA will withdraw these Federal water quality standards at the Tribes' request.

One commenter noted that although a narrative toxics "free from" criterion was included in the proposal, numeric criteria were not, and recommended that EPA consider the fact that the State of Washington adopted numeric criteria for certain toxics in January, 1988, and propose to adopt equivalent criteria for reservation/State boundary waters.

Although an agreement exists between the State and the Tribe to maintain consistent water quality standards on boundary waters, this agreement does not involve EPA. It is EPA's judgment that, at present, it is appropriate not to propose numeric toxics criteria for waters of the Colville reservation. A primary factor in this decision is that EPA knows of no toxic pollutant that can reasonably be expected to be interfering with designated uses of the reservation. The Colville Tribes report only one point source discharger on the reservation and no toxics discovered from that discharger. EPA is aware of no other source of toxics in the area. Given these circumstances, numeric criteria for CWA section 307(a) pollutants are not required by CWA section 303(c)(2)(B). Until the Tribes qualify for treatment as a State for purposes of the standards program, or until additional information substantiating the need for numeric toxics criteria leads EPA to adopt numeric toxics criteria, EPA believes it is sufficient for the Agency to use the Agency's 304(a) criteria guidance to implement the narrative toxics "free from" criterion in any situation that might arise concerning the discharge of toxics.

One commenter noted that EPA erroneously noted in the Preamble to the proposed rulemaking that the Colville Water Quality Standards Act was amended by resolution (#1985-20) after the August 28, 1985 EPA approval of the Colville Water Quality Management Program, when in fact the amendment occurred before such EPA approval. EPA acknowledges the error.

One commenter noted several differences between the standards adopted by the State of Washington and the proposal. First, the State standards use the fecal coliform organism as a bacterial indicator, instead of enterococcus as used in the proposal. Second, the proposed Class III (equivalent to State B waters) includes primary contact recreation as a

<sup>3</sup> See letter from Ernesta Barnes, Regional Administrator, Region X, to the Honorable Booth Gardner, Governor, State of Washington, August 28, 1985, a copy of which is in the docket for today's rule.



designated use, while State Class B does not. Third, the proposed Class III and IV have different oxygen criteria than equivalent State Class B and C.

With regard to the first difference, EPA uses enterococcus because research has established that it is a better indicator. EPA encourages the State to change its bacterial indicator to be consistent with EPA's section 304(a) guidance. With regard to the second difference, EPA has included primary contact recreation as a designated use in support of the fishable/swimmable goal of the Clean Water Act, and assumes that the State conducts Use Attainability Analyses during each triennial review to determine whether the primary contact recreation use is attainable in their Class B waters. With regard to the third difference, EPA has based the dissolved oxygen criteria on the 1986 dissolved oxygen criteria document, and encourages States to update their criteria to reflect the most recent aquatic effects research.

#### C. Changes to the Proposed Rule

On EPA's initiative, the definition of "Reservation" was changed in the final rule to be consistent with the statutory definition provided in section 518 of the CWA. Specifically, the definition of "Reservation" which appeared in the proposed rulemaking was expanded to also include the language which was used in defining "Federal Indian Reservation" in CWA section 518(h) (i.e., "Federal Indian Reservation" means all land within the limits of any Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation). Since the definition of "reservation" in section 518(h) tracks the common definition of the term (see 18 U.S.C. 1151(a)), this change will have no substantive effect on the rule. The change is meant only as a clarification.

On EPA's initiative, paragraph (c)(2) was re-written to be consistent with the requirements of § 131.13 of the water quality standards regulation. Section 131.13 authorizes the States to adopt general policies affecting the application of their water quality standards such as mixing zone, variance, and low-flow policies, but only if such policies are included as a part of the State's water quality standards. Proposed paragraph (c)(2), however, would have allowed the Regional Administrator to implement such general policies without including such policies in § 131.35. The new paragraph (c)(2) establishes a mixing zone policy in § 131.35, consistent with § 131.13, which authorizes the Regional

Administrator to designate mixing zones, provided that such mixing zones are consistent with the most current EPA mixing zone guidelines in the Water Quality Standards Handbook and the Technical Support Document for Water Quality Based Toxics Control. EPA notes that a low-flow policy was already included in proposed paragraph (c)(6). At this time, EPA declines to establish a variance policy in § 131.35.

On EPA's initiative, the definition of "Acute toxicity" was changed in the final rule to be more consistent with the definition of "acute" in EPA's Technical Support Document for Water Quality Based Toxics Control. The proposed definition limited acutely toxics effects only to mortality and the period of exposure only to 96 hours.

#### D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, EPA must prepare a Regulatory Flexibility Analysis for all proposed regulations that have a significant impact on a substantial number of small entities. EPA has determined that, because a Tribal regulation is already in place which is essentially equivalent in stringency to this rule, this Rule will not have significant adverse impact on small entities.

#### E. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of preparing a Regulatory Impact Analysis. A major rule is defined as a regulation which is likely to result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers; individual industries; Federal, State, and local government agencies; or geographic regions; or
- (3) Significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

EPA has determined that this rule does not meet the definition of a major regulation; therefore, no Regulatory Impact Analysis is required. Also, as required by Executive Order 12291 this rule has been reviewed by the Office of Management and Budget (OMB). Any written comments from OMB to EPA and any response to those comments are available for public inspection through contacting the person listed at the beginning of this notice.

#### F. Paperwork Reduction Act

Promulgation of Federal water quality standards was one of the actions contemplated under the water quality standards regulation, which is covered by ICR # 2040-0049 approved by OMB. Since there are no significant additional information collection provisions in this rule, there is no requirement for approval of an additional ICR by OMB for the Paperwork Reduction Act of 1980.

#### G. List of Subjects in 40 CFR Part 131

Indian Reservation water quality standards, Water pollution control, Water quality standards.

Date: June 23, 1989.

William K. Reilly,  
Administrator.

For the reasons set out in the SUPPLEMENTARY INFORMATION section, Part 131 of the Title 40 of the Code of Federal Regulations is amended as follows:

#### PART 131—WATER QUALITY STANDARDS

1. The authority citation for Part 131 continues to read as follows:

Authority: Clean Water Act, P.L. 92-500, as amended; 33 U.S.C. 1251 *et seq.*

2. Section 131.35 is added to read as follows:

##### § 131.35 Colville Confederated Tribes Indian Reservation.

The water quality standards applicable to the waters within the Colville Indian Reservation, located in the State of Washington.

(a) *Background.* (1) It is the purpose of these Federal water quality standards to prescribe minimum water quality requirements for the surface waters located within the exterior boundaries of the Colville Indian Reservation to ensure compliance with section 303(c) of the Clean Water Act.

(2) The Colville Confederated Tribes have a primary interest in the protection, control, conservation, and utilization of the water resources of the Colville Indian Reservation. Water quality standards have been enacted into tribal law by the Colville Business Council of the Confederated Tribes of the Colville Reservation, as the Colville Water Quality Standards Act, CTC Title 33 (Resolution No. 1984-526 (August 6, 1984) as amended by Resolution No. 1985-20 (January 18, 1985)).

(b) *Territory Covered.* The provisions of these water quality standards shall apply to all surface waters within the



exterior boundaries of the Colville Indian Reservation.

(c) *Applicability, Administration and Amendment.* (1) The water quality standards in this section shall be used by the Regional Administrator for establishing any water quality based National Pollutant Discharge Elimination System Permit (NPDES) for point sources on the Colville Confederated Tribes Reservation.

(2) In conjunction with the issuance of section 402 or section 404 permits, the Regional Administrator may designate mixing zones in the waters of the United States on the reservation on a case-by-case basis. The size of such mixing zones and the in-zone water quality in such mixing zones shall be consistent with the applicable procedures and guidelines in EPA's Water Quality Standards Handbook and the Technical Support Document for Water Quality Based Toxics Control.

(3) Amendments to the section at the request of the Tribe shall proceed in the following manner.

(i) The requested amendment shall first be duly approved by the Confederated Tribes of the Colville Reservation (and so certified by the Tribes Legal Counsel) and submitted to the Regional Administrator.

(ii) The requested amendment shall be reviewed by EPA (and by the State of Washington, if the action would affect a boundary water).

(iii) If deemed in compliance with the Clean Water Act, EPA will propose and promulgate an appropriate change to this section.

(4) Amendment of this section at EPA's initiative will follow consultation with the Tribe and other appropriate entities. Such amendments will then follow normal EPA rulemaking procedures.

(5) All other applicable provisions of this Part 131 shall apply on the Colville Confederated Tribes Reservation. Special attention should be paid to §§ 131.6, 131.10, 131.11 and 131.20 for any amendment to these standards to be initiated by the Tribe.

(6) All numeric criteria contained in this section apply at all in-stream flow rates greater than or equal to the flow rate calculated as the minimum 7-consecutive day average flow with a recurrence frequency of once in ten years (7Q10); narrative criteria (§ 131.35(e)(3)) apply regardless of flow. The 7Q10 low flow shall be calculated using methods recommended by the U.S. Geological Survey.

(d) *Definitions.* (1) "Acute toxicity" means a deleterious response (e.g., mortality, disorientation,

immobilization) to a stimulus observed in 96 hours or less.

(2) "Background conditions" means the biological, chemical, and physical conditions of a water body, upstream from the point or non-point source discharge under consideration. Background sampling location in an enforcement action will be upstream from the point of discharge, but not upstream from other inflows. If several discharges to any water body exist, and an enforcement action is being taken for possible violations to the standards, background sampling will be undertaken immediately upstream from each discharge.

(3) "Ceremonial and Religious water use" means activities involving traditional Native American spiritual practices which involve, among other things, primary (direct) contact with water.

(4) "Chronic Toxicity" means the lowest concentration of a constituent causing observable effects (i.e., considering lethality, growth, reduced reproduction, etc.) over a relatively long period of time, usually a 28-day test period for small fish test species.

(5) "Council" or "Tribal Council" means the Colville Business Council of the Colville Confederated Tribes.

(6) "Geometric mean" means the "nth" root of a product of "n" factors.

(7) "Mean retention time" means the time obtained by dividing a reservoir's mean annual minimum total storage by the non-zero 30-day, ten-year low-flow from the reservoir.

(8) "Mixing Zone" or "dilution zone" means a limited area or volume of water where initial dilution of a discharge takes place; and where numeric water quality criteria can be exceeded but acutely toxic conditions are prevented from occurring.

(9) "pH" means the negative logarithm of the hydrogen ion concentration.

(10) "Primary contact recreation" means activities where a person would have direct contact with water to the point of complete submergence, including but not limited to skin diving, swimming, and water skiing.

(11) "Regional Administrator" means the Administrator of EPA's Region X.

(12) "Reservation" means all land within the limits of the Colville Indian Reservation, established on July 2, 1872 by Executive Order, presently containing 1,389,000 acres more or less, and under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(13) "Secondary contact recreation" means activities where a person's water

contact would be limited to the extent that bacterial infections of eyes, ears, respiratory, or digestive systems or urogenital areas would normally be avoided (such as wading or fishing).

(14) "Surface water" means all water above the surface of the ground within the exterior boundaries of the Colville Indian Reservation including but not limited to lakes, ponds, reservoirs, artificial impoundments, streams, rivers, springs, seeps and wetlands.

(15) "Temperature" means water temperature expressed in Centigrade degrees (C).

(16) "Total dissolved solids" (TDS) means the total filterable residue that passes through a standard glass fiber filter disk and remains after evaporation and drying to a constant weight at 180 degrees C. It is considered to be a measure of the dissolved salt content of the water.

(17) "Toxicity" means acute and/or chronic toxicity.

(18) "Tribe" or "Tribes" means the Colville Confederated Tribes.

(19) "Turbidity" means the clarity of water expressed as nephelometric turbidity units (NTU) and measured with a calibrated turbidimeter.

(20) "Wildlife habitat" means the waters and surrounding land areas of the Reservation used by fish, other aquatic life and wildlife at any stage of their life history or activity.

(e) *General considerations.* The following general guidelines shall apply to the water quality standards and classifications set forth in the use designation Sections.

(1) *Classification Boundaries.* At the boundary between waters of different classifications, the water quality standards for the higher classification shall prevail.

(2) *Antidegradation Policy.* This antidegradation policy shall be applicable to all surface waters of the Reservation.

(i) Existing in-stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(ii) Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Regional Administrator finds, after full satisfaction of the inter-governmental coordination and public participation provisions of the Tribes' continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which



the waters are located. In allowing such degradation or lower water quality, the Regional Administrator shall assure water quality adequate to protect existing uses fully. Further, the Regional Administrator shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(iii) Where high quality waters are identified as constituting an outstanding national or reservation resource, such as waters within areas designated as unique water quality management areas and waters otherwise of exceptional recreational or ecological significance, and are designated as special resource waters, that water quality shall be maintained and protected.

(iv) In those cases where potential water quality impairment associated with a thermal discharge is involved, this antidegradation policy's implementing method shall be consistent with section 316 of the Clean Water Act.

(3) *Aesthetic Qualities.* All waters within the Reservation, including those within mixing zones, shall be free from substances, attributable to wastewater discharges or other pollutant sources, that:

- (i) Settle to form objectionable deposits;
- (ii) Float as debris, scum, oil, or other matter forming nuisances;
- (iii) Produce objectionable color, odor, taste, or turbidity;
- (iv) Cause injury to, are toxic to, or produce adverse physiological responses in humans, animals, or plants; or
- (v) produce undesirable or nuisance aquatic life.

(4) *Analytical Methods.* (i) The analytical testing methods used to measure or otherwise evaluate compliance with water quality standards shall to the extent practicable, be in accordance with the "Guidelines Establishing Test Procedures for the Analysis of Pollutants" (40 CFR Part 136). When a testing method is not available for a particular substance, the most recent edition of "Standard Methods for the Examination of Water and Wastewater" (published by the American Public Health Association, American Water Works Association, and the Water Pollution Control Federation) and other or superseding methods published and/or approved by EPA shall be used.

(f) *General Water Use and Criteria Classes.* The following criteria shall apply to the various classes of surface

waters on the Colville Indian Reservation:

(1) *Class I (Extraordinary)*—(i) *Designated uses.* The designated uses include, but are not limited to, the following:

- (A) Water supply (domestic, industrial, agricultural).
- (B) Stock watering.
- (C) Fish and shellfish: Salmonid migration, rearing, spawning, and harvesting; other fish migration, rearing, spawning, and harvesting.
- (D) Wildlife habitat.
- (E) Ceremonial and religious water use.

(F) Recreation (primary contact recreation, sport fishing, boating and aesthetic enjoyment).

(G) Commerce and navigation.

(ii) *Water quality criteria.* (A) Bacteriological Criteria. The geometric mean of the enterococci bacteria densities in samples taken over a 30 day period shall not exceed 8 per 100 milliliters, nor shall any single sample exceed an enterococci density of 35 per 100 milliliters. These limits are calculated as the geometric mean of the collected samples approximately equally spaced over a thirty day period.

(B) Dissolved oxygen—The dissolved oxygen shall exceed 9.5 mg/l.

(C) Total dissolved gas—concentrations shall not exceed 110 percent of the saturation value for gases at the existing atmospheric and hydrostatic pressures at any point of sample collection.

(D) Temperature—shall not exceed 16.0 degrees C due to human activities. Temperature increases shall not, at any time, exceed  $t = 23/(T + 5)$ .

(1) When natural conditions exceed 16.0 degrees C, no temperature increase will be allowed which will raise the receiving water by greater than 0.3 degrees C.

(2) For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

(3) Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8 degrees C, and the maximum water temperature shall not exceed 10.3 degrees C.

(E) pH shall be within the range of 6.5 to 8.5 with a human-caused variation of less than 0.2 units.

(F) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(G) Toxic, radioactive, nonconventional, or deleterious material concentrations shall be less than those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect designated water uses.

(2) *Class II (Excellent)*—(i) *Designated uses.* The designated uses include but are not limited to, the following:

- (A) Water supply (domestic, industrial, agricultural).
- (B) Stock watering.
- (C) Fish and shellfish: Salmonid migration, rearing, spawning, and harvesting; other fish migration, rearing, spawning, and harvesting; crayfish rearing, spawning, and harvesting.
- (D) Wildlife habitat.
- (E) Ceremonial and religious water use.

(F) Recreation (primary contact recreation, sport fishing, boating and aesthetic enjoyment).

(G) Commerce and navigation.

(ii) *Water quality criteria.* (A) Bacteriological Criteria—The geometric mean of the enterococci bacteria densities in samples taken over a 30 day period shall not exceed 16/100 ml, nor shall any single sample exceed an enterococci density of 75 per 100 milliliters. These limits are calculated as the geometric mean of the collected samples approximately equally spaced over a thirty day period.

(B) Dissolved oxygen—The dissolved oxygen shall exceed 8.0 mg/l.

(C) Total dissolved gas—concentrations shall not exceed 110 percent of the saturation value for gases at the existing atmospheric and hydrostatic pressures at any point of sample collection.

(D) Temperature—shall not exceed 18.0 degrees C due to human activities. Temperature increases shall not, at any time, exceed  $t = 28/(T + 7)$ .

(1) When natural conditions exceed 18 degrees C no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3 degrees C.

(2) For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

(3) Provided that temperature increase resulting from non-point source activities shall not exceed 2.8 degrees C, and the maximum water temperature shall not exceed 18.3 degrees C.



(E) pH shall be within the range of 6.5 to 8.5 with a human-caused variation of less than 0.5 units.

(F) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(G) Toxic, radioactive, nonconventional, or deleterious material concentrations shall be less than those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect designated water uses.

(3) *Class III (Good).*—(i) *Designated uses.* The designated uses include but are not limited to, the following:

(A) Water supply (industrial, agricultural).

(B) Stock watering.

(C) Fish and shellfish: Salmonid migration, rearing, spawning, and harvesting; other fish migration, rearing, spawning, and harvesting; crayfish rearing, spawning, and harvesting.

(D) Wildlife habitat.

(E) Recreation (secondary contact recreation, sport fishing, boating and aesthetic enjoyment).

(F) Commerce and navigation.

(ii) *Water quality criteria.* (A) *Bacteriological Criteria.*—The geometric mean of the enterococci bacteria densities in samples taken over a 30 day period shall not exceed 33/100 ml, nor shall any single sample exceed an enterococci density of 150 per 100 milliliters. These limits are calculated as the geometric mean of the collected samples approximately equally spaced over a thirty day period.

(B) Dissolved oxygen.

	Early life stages <sup>1,2</sup>	Other life stages
7 day mean .....	9.5 (6.5)	<sup>3</sup> NA
1 day minimum <sup>4</sup> .....	8.0 (5.0)	6.5

<sup>1</sup> These are water column concentrations recommended to achieve the required intergravel dissolved oxygen concentrations shown in parentheses. The 3 mg/L differential is discussed in the dissolved oxygen criteria document (EPA 440/5-86-003, April 1986). For species that have early life stages exposed directly to the water column, the figures in parentheses apply.

<sup>2</sup> Includes all embryonic and larval stages and all juvenile forms to 30-days following hatching.

<sup>3</sup> NA (not applicable)

<sup>4</sup> All minima should be considered as instantaneous concentrations to be achieved at all times.

(C) Total dissolved gas concentrations shall not exceed 110 percent of the saturation value for gases at the existing atmospheric and hydrostatic pressures at any point of sample collection.

(D) Temperature shall not exceed 21.0 degrees C due to human activities.

Temperature increases shall not, at any time, exceed  $t = 34/(T + 9)$ .

(1) When natural conditions exceed 21.0 degrees C no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3 degrees C.

(2) For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

(3) Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8 degrees C, and the maximum water temperature shall not exceed 21.3 degrees C.

(E) pH shall be within the range of 6.5 to 8.5 with a human-caused variation of less than 0.5 units.

(F) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(G) Toxic, radioactive, nonconventional, or deleterious material concentrations shall be less than those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect designated water uses.

(4) *Class IV (Fair).*—(i) *Designated uses.* The designated uses include but are not limited to, the following:

(A) Water supply (industrial).

(B) Stock watering.

(C) Fish (salmonid and other fish migration).

(D) Recreation (secondary contact recreation, sport fishing, boating and aesthetic enjoyment).

(E) Commerce and navigation.

(ii) *Water quality criteria.* (A) Dissolved oxygen.

	During periods of salmonid and other fish migration	During all other time periods
30 day mean .....	6.5	5.5
7 day mean .....	<sup>1</sup> NA	<sup>1</sup> NA
7 day mean minimum .....	5.0	4.0
1 day minimum <sup>2</sup> .....	4.0	3.0

<sup>1</sup> NA (not applicable).

<sup>2</sup> All minima should be considered as instantaneous concentrations to be achieved at all times.

(B) Total dissolved gas—concentrations shall not exceed 110 percent of the saturation value for gases at the existing atmospheric and hydrostatic pressures at any point of sample collection.

(C) Temperature shall not exceed 22.0 degrees C due to human activities.

Temperature increases shall not, at any time, exceed  $t = 20/(T + 2)$ .

(1) When natural conditions exceed 22.0 degrees C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3 degrees C.

(2) For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

(D) pH shall be within the range of 6.5 to 9.0 with a human-caused variation of less than 0.5 units.

(E) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(F) Toxic, radioactive, nonconventional, or deleterious material concentrations shall be less than those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect designated water uses.

(5) *Lake Class.*—(i) *Designated uses.* The designated uses include but are not limited to, the following:

(A) Water supply (domestic, industrial, agricultural).

(B) Stock watering.

(C) Fish and shellfish: Salmonid migration, rearing, spawning, and harvesting; other fish migration, rearing, spawning, and harvesting; crayfish rearing, spawning, and harvesting.

(D) Wildlife habitat.

(E) Ceremonial and religious water use.

(F) Recreation (primary contact recreation, sport fishing, boating and aesthetic enjoyment).

(G) Commerce and navigation.

(ii) *Water quality criteria.* (A) *Bacteriological Criteria.* The geometric mean of the enterococci bacteria densities in samples taken over a 30 day period shall not exceed 33/100 ml, nor shall any single sample exceed an enterococci density of 150 per 100 milliliters. These limits are calculated as the geometric mean of the collected samples approximately equally spaced over a thirty day period.

(B) Dissolved oxygen—no measurable decrease from natural conditions.

(C) Total dissolved gas concentrations shall not exceed 110 percent of the saturation value for gases at the existing atmospheric and hydrostatic pressures at any point of sample collection.



(D) Temperature—no measurable change from natural conditions.

(E) pH—no measurable change from natural conditions.

(F) Turbidity shall not exceed 5 NTU over natural conditions.

(G) Toxic, radioactive, nonconventional, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

(6) *Special Resource Water Class (SRW)*—(i) *General characteristics.* These are fresh or saline waters which comprise a special and unique resource to the Reservation. Water quality of this class will be varied and unique as determined by the Regional Administrator in cooperation with the Tribes.

(ii) *Designated uses.* The designated uses include, but are not limited to, the following:

(A) Wildlife habitat.

(B) Natural foodchain maintenance.

(iii) *Water quality criteria.*

(A) Enterococci bacteria densities shall not exceed natural conditions.

(B) Dissolved oxygen—shall not show any measurable decrease from natural conditions.

(C) Total dissolved gas shall not vary from natural conditions.

(D) Temperature—shall not show any measurable change from natural conditions.

(E) pH shall not show any measurable change from natural conditions.

(F) Settleable solids shall not show any change from natural conditions.

(G) Turbidity shall not exceed 5 NTU over natural conditions.

(H) Toxic, radioactive, or deleterious material concentrations shall not exceed those found under natural conditions.

(g) *General Classifications.* General classifications applying to various surface waterbodies not specifically classified under § 131.35(h) are as follows:

(1) All surface waters that are tributaries to Class I waters are classified Class I, unless otherwise classified.

(2) Except for those specifically classified otherwise, all lakes with existing average concentrations less than 2000 mg/L TDS and their feeder streams on the Colville Indian Reservation are classified as Lake Class and Class I, respectively.

(3) All lakes on the Colville Indian Reservation with existing average concentrations of TDS equal to or exceeding 2000 mg/L and their feeder streams are classified as Lake Class and

Class I respectively unless specifically classified otherwise.

(4) All reservoirs with a mean detention time of greater than 15 days are classified Lake Class.

(5) All reservoirs with a mean detention time of 15 days or less are classified the same as the river section in which they are located.

(6) All reservoirs established on pre-existing lakes are classified as Lake Class.

(7) All wetlands are assigned to the Special Resource Water Class.

(8) All other waters not specifically assigned to a classification of the reservation are classified as Class II.

(h) *Specific Classifications.* Specific classifications for surface waters of the Colville Indian Reservation are as follows:

(1) *Streams:*

Alice Creek	Class III
Anderson Creek	Class III
Armstrong Creek	Class III
Barnaby Creek	Class II
Bear Creek	Class III
Beaver Dam Creek	Class II
Bridge Creek	Class II
Brush Creek	Class III
Buckhorn Creek	Class III
Cache Creek	Class III
Canteen Creek	Class I
Capoose Creek	Class III
Cobbs Creek	Class III
Columbia River from Chief Joseph Dam to Wells Dam	
Columbia River from northern Reservation boundary to Grand Coulee Dam (Roosevelt Lake)	
Columbia River from Grand Coulee Dam to Chief Joseph Dam	
Cook Creek	Class I
Cooper Creek	Class III
Cornstalk Creek	Class III
Cougar Creek	Class I
Coyote Creek	Class II
Deerhorn Creek	Class III
Dick Creek	Class III
Dry Creek	Class I
Empire Creek	Class III
Faye Creek	Class I
Forty Mile Creek	Class III
Gibson Creek	Class I
Gold Creek	Class II
Granite Creek	Class II
Grizzly Creek	Class III
Haley Creek	Class III
Hall Creek	Class II
Hall Creek, West Fork	Class I
Iron Creek	Class III
Jack Creek	Class III
Jerred Creek	Class I
Joe Moses Creek	Class III
John Tom Creek	Class III
Jones Creek	Class I
Kartar Creek	Class III
Kincaid Creek	Class III
King Creek	Class III
Klondyke Creek	Class I
Lime Creek	Class III
Little Jim Creek	Class III

Little Nespelem	Class II
Louie Creek	Class III
Lynx Creek	Class II
Manila Creek	Class III
McAllister Creek	Class III
Meadow Creek	Class III
Mill Creek	Class II
Mission Creek	Class III
Nespelem River	Class II
Nez Perce Creek	Class III
Nine Mile Creek	Class II
Nineteen Mile Creek	Class III
No Name Creek	Class II
North Nanamkin Creek	Class III
North Star Creek	Class III
Okanogan River from Reservation north boundary to Columbia River	
Olds Creek	Class I
Omak Creek	Class II
Onion Creek	Class II
Parmenter Creek	Class III
Peel Creek	Class III
Peter Dan Creek	Class III
Rock Creek	Class I
San Poil River	Class I
Sanpoil, River West Fork	Class II

Seventeen Mile Creek	Class III
Silver Creek	Class III
Sitdown Creek	Class III
Six Mile Creek	Class III
South Nanamkin Creek	Class III
Spring Creek	Class III
Stapaloop Creek	Class III
Stepstone Creek	Class III
Stranger Creek	Class II
Strawberry Creek	Class III
Swimptkin Creek	Class III
Three Forks Creek	Class I
Three Mile Creek	Class III
Thirteen Mile Creek	Class II
Thirty Mile Creek	Class II
Trail Creek	Class III
Twentyfive Mile Creek	Class III
Twentyone Mile Creek	Class III
Twentythree Mile Creek	Class III
Wannacot Creek	Class III
Wells Creek	Class I
Whitelaw Creek	Class III
Wilmont Creek	Class II

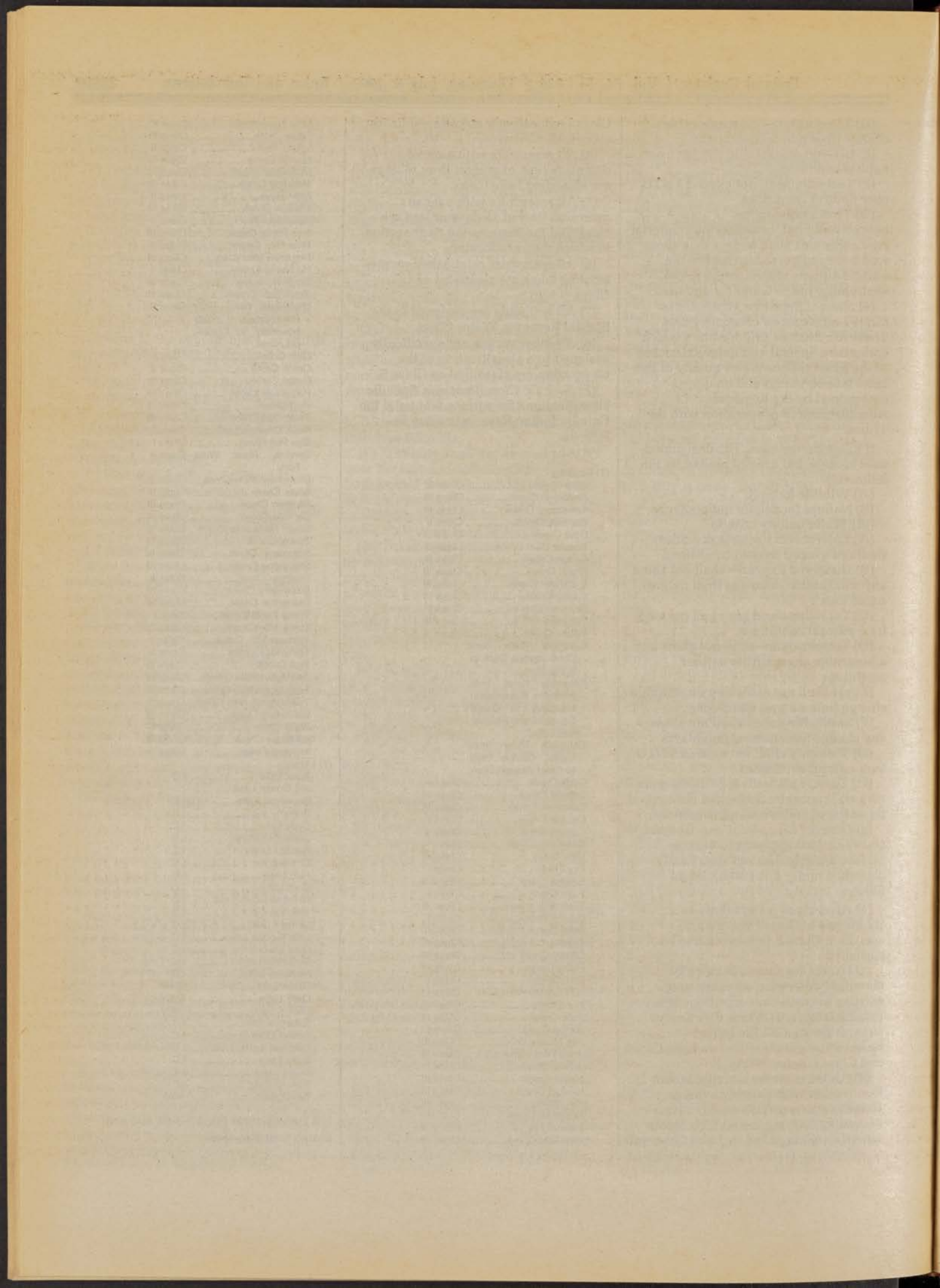
(2) *Lakes:*

Apex Lake	LC
Big Goose Lake	LC
Bourgeau Lake	LC
Buffalo Lake	LC
Cody Lake	LC
Crawfish Lakes	LC
Camille Lake	LC
Elbow Lake	LC
Fish Lake	LC
Gold Lake	LC
Great Western Lake	LC
Johnson Lake	LC
LaFleur Lake	LC
Little Goose Lake	LC
Little Owhi Lake	LC
McGinnis Lake	LC
Nicholas Lake	LC
Omak Lake	SRW
Owhi Lake	SRW
Penley Lake	SRW
Rebecca Lake	LC
Round Lake	LC
Simpson Lake	LC
Soap Lake	LC
Sugar Lake	LC
Summit Lake	LC
Twin Lakes	SRW

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# 50 Part Federal Register

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Thursday  
July 6, 1989

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## Part IV

### Merit Systems Protection Board

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5 CFR Parts 1201-1206 and 1209  
Miscellaneous Regulations; Final Rules



## MERIT SYSTEMS PROTECTION BOARD

### 5 CFR Part 1201

RIN 3124-AA10

#### Practices and Procedures

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Interim regulations; request for comment.

**SUMMARY:** The U.S. Merit Systems Protection Board is revising its entire rules of practice and procedure in this part, with the exception of Appendix I, for the convenience of the public, parties and practitioners before the Board. The Board has completed a thorough review of its existing regulations to identify any portions that could be rewritten in plain English so that the Board's requirements and practice could be more readily understood by persons who are not practitioners in personnel administration or the law. The regulations published today reflect that review and also implement the Whistleblower Protection Act of 1989, Pub. L. 101-12. Except for the sections described below, the revised language is not intended to change the meaning or requirements of any of the existing sections. The Board invites public comment on these regulations with respect to the ease of understanding and adherence to legal requirements.

**DATES:** Effective date: July 9, 1989. Submit written comments on or before September 5, 1989.

**ADDRESS:** Send comments to Robert E. Taylor, Clerk of the Board, U.S. Merit Systems Protection Board, 1120 Vermont Avenue NW., Washington, DC 20419.

**FOR FURTHER INFORMATION CONTACT:** Charles J. Stanislav, (202) 653-8931.

**SUPPLEMENTARY INFORMATION:** On July 10, 1986, the Board published final regulations in this part as a first attempt to enhance the public's and practitioners' awareness and understanding of the Board's rules of practice. (51 FR 25146) The regulations published today are a further attempt to present the Board's requirements in plain English, to implement the Whistleblower Protection Act of 1989 (Pub. L. 101-12) and to make the following changes:

(a) Section 1201.3 is amended at (a)(6) to add cites to 5 CFR Part 842 and 5 U.S.C. 8461(e)(1). A new paragraph (b) is added to provide that this part applies to cases under Part 1209 unless other specific provisions are made in that part. The existing paragraph (b) is renumbered paragraph (c) and a new

paragraph (d) is added to provide that appealability is not affected by retirement status.

(b) Section 1201.4 is amended by deleting paragraph (b) and paragraphs (c) through (m) are renumbered (b) through (1).

(c) Section 1201.11 is amended by adding that Subpart B applies to whistleblower cases under Part 1209 unless other specific provisions are made in that part.

(d) Section 1201.24 is amended at (a)(8) to add that an appellant must inform the Board whether a formal discrimination complaint has been filed regarding the matter appealed. Paragraph (a) is amended at (9) to make it clear that a petition for appeal must contain the original signature of the appellant. Paragraph (e) is amended to remove the provision that failure to make a timely request for a hearing will be deemed to constitute a waiver of the right to a hearing.

(e) Section 1201.25 is amended by removing paragraph (b) and eliminating the provision that agencies can request a hearing. This section is restructured accordingly since paragraphs are no longer needed.

(f) Section 1201.34 is amended at paragraph (b)(2) to require that the Special Counsel obtain permission to intervene from the individual in certain cases. Paragraph (e) is amended by adding a definition of *amicus curiae*.

(g) Section 1201.37 is amended at paragraph (a) by renumbering subparagraph (2) as subparagraph (3). A new subparagraph (2) is added to state that an agency is liable for attorney fees and other reasonable costs when the appellant prevails and the decision is based upon a finding of any prohibited personnel practice.

(h) Section 1201.41 paragraph (b) is amended at (5) to remove the authority to order a hearing at the request of an agency. Paragraph (b) is also amended by redesignating (13) as (15) and adding a new (13) to require that persons who can be identified from the record as clearly and directly affected in a retirement-related case be notified of a pending appeal and of their opportunity to request to intervene. New subparagraphs (14) and (16) are added to provide for issuing protective orders and to determine whether interim relief is appropriate for prevailing appellants.

(i) Section 1201.42 paragraph (b) is amended to provide that the reasons for requesting a presiding official to withdraw may be set out in either an affidavit or a signed and dated declaration in accordance with 28 U.S.C. 1746.

(j) Section 1201.51 paragraph (b) is amended by moving the portion concerning postponement to a new paragraph (c) and redesignating the existing paragraph (c) as paragraph (d). The new paragraph (c) is amended to provide that a motion for postponement may be accompanied by either an affidavit or a signed and dated declaration in accordance with 28 U.S.C. 1746.

(k) Section 1201.53 paragraph (c) is amended to provide that the reasons for a request for exception may be set out either in an affidavit or in a signed and dated declaration in accordance with 28 U.S.C. 1746.

(l) Section 1201.55 paragraph (a) is amended by adding that motions made at prehearing conferences are not required to be in writing and to eliminate the requirement that a proposed order be submitted with a motion. A new paragraph (d) is added to state the requirements for filing a motion for a protective order.

(m) Section 1201.67 is amended by adding a definition of official notice.

(n) Section 1201.81 is amended at paragraph (a) to change the citation. Paragraph (c) is amended to state that a presiding official who lacks authority to rule on a subpoena request is to refer it to an official with authority to rule rather than to specifically the ALJ or a Board member.

(o) Section 1201.83 is amended by numbering the existing paragraph as (a) and adding paragraph (b) to provide for service of a subpoena in a foreign country.

(p) Section 1201.85 is amended by numbering the existing paragraph as (a), changing the citation and adding that the U.S. District Court for the District of Columbia has jurisdiction to enforce subpoenas issued to individuals in foreign countries. Paragraph (b) is added to state Board authority to seek enforcement of Special Counsel subpoenas.

(q) Section 1201.101 paragraph (b) is amended at (2) by adding officer [of the Board] to the definition of decision-making official.

(r) Section 1201.111 is amended to add subparagraph (4) to paragraph (b), stating that an initial decision will contain a statement as to whether interim relief is granted to a prevailing appellant. Paragraph (c) is added to provide for interim relief.

(s) Section 1201.114 is amended at paragraph (g)(2) to state that the Special Counsel cannot intervene in cases brought under 5 U.S.C. 1221 or 7701 without the consent of the individual.



(t) Section 1201.115 is amended by numbering the first sentence as paragraph (a) and adding paragraph (b) with respect to interim relief where the appellant was the prevailing party and the requirements an agency must meet when it files a petition for review. The remaining portion of the existing paragraph is numbered (c).

(u) Section 1201.123 is amended by numbering the first sentence as paragraph (a) and existing paragraph (a) is renumbered as paragraph (a)(1) with clarifying language added that corrective action can be brought for prohibited personnel practices or a pattern of prohibited practice and to change the citation. The existing paragraph (b) is deleted and (c) is renumbered (a)(2) along with a citation change. Paragraph (a)(3) is added providing that the Special Counsel may file complaints with respect to other matters within the jurisdiction of the Special Counsel under 5 U.S.C. 1216. Existing paragraph (d) is renumbered (a)(4) and the citation is changed. The remainder of the existing paragraph is renumbered paragraph (b) and a new paragraph (c) is added providing that the Special Counsel cannot continue to seek corrective action on behalf of an individual who has brought an individual right of action case to the Board unless the individual consents.

(v) Section 1201.124 is amended by renumbering paragraph (a) as paragraph (b) and renumbering the subparagraphs from (a) through (e) as (1) through (5) and changing the citation. A new paragraph (a) is added setting forth the rights of individuals on whose behalf the Special Counsel seeks corrective action.

(w) Section 1201.126 is amended by changing the citation in paragraph (a). Existing paragraph (b) is deleted and a new paragraph (b) is added which provides that the Board must order corrective action if the Special Counsel proves that whistleblowing was a contributing factor in the personnel action, unless the agency demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the individual's whistleblowing. The citation is changed in paragraphs (c) and (e). Paragraph (d) is changed to make it clear that the Board's determination that removal is warranted is made under 5 U.S.C. 1505 and the withholding of funds may be ordered under 5 U.S.C. 1506.

(x) Section 1201.127 is amended by changing the citation in the first sentence and paragraph (c) is revised to reflect new procedures for Special Counsel stay requests to conform to Pub. L. 101-12. Paragraph (c)(3) is added to require reports during the pendency of a

stay. Paragraph (e) is added to implement the Board's authority to issue protective orders.

(y) Section 1201.128 is amended by numbering the first sentence as paragraph (a). Paragraph (b) is added to state the right of an individual adversely affected by a Board order in a corrective action case to seek review in the Court of Appeals for the Federal Circuit. The remainder of the existing paragraph is numbered (c), the citation is changed and the language is revised to provide that an individual subject to a final order imposing disciplinary action may seek review in the Court of Appeals for the Federal Circuit.

(z) Section 1201.129 paragraph (a) is amended to provide that pleadings may be filed as directed rather than only with the clerk and the citation is changed. Paragraph (d) is added to provide that no additional evidence will be accepted with a request for exception unless it is shown to be new and material evidence that was not available, despite due diligence, before the record was closed.

(aa) Section 1201.154 is amended by restructuring this section to clarify the filing requirements for petitions raising an issue of discrimination in an action otherwise appealable to the Board and to add paragraph (e) providing for the closing of the record and the conditions for considering evidence or argument submitted after the record has been closed.

(bb) Section 1201.181 is amended by changing the citation in paragraph (a).

(cc) Section 1201.182 is amended by renumbering the last sentence of the existing section as paragraph (d) and adding a new paragraph (c) setting forth the procedures and requirements for an employee aggrieved by the failure of any other employee to comply with an order of the Board to petition the Board for enforcement.

(dd) Section 1201.183 is amended by changing the citations in paragraphs (b), (c), and (d).

(ee) Section 1201.191 is amended by renumbering the existing paragraph as paragraph (a) and renumbering the subparagraphs from (a) through (c) as (1) through (3). A new paragraph (b) is added to state the savings provisions applicable to the Whistleblower Protection Act of 1989.

#### Regulatory Flexibility Act

The Clerk, Merit Systems Protection Board, certifies that these regulations will not have a significant economic impact on a substantial number of small entities because they primarily affect Federal employees.

#### List of Subject in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Merit Systems Protection Board revises 5 CFR part 1201 as follows:

#### PART 1201—PRACTICES AND PROCEDURES

##### Subpart A—Jurisdiction and Definitions

###### Sec.

- 1201.1 General.
- 1201.2 Original jurisdiction: Definition and scope of jurisdiction.
- 1201.3 Appellate jurisdiction: Definition and scope of jurisdiction.
- 1201.4 General definitions.

##### Subpart B—Procedures for Appellate Cases

- 1201.11 Scope and policy.
- 1201.12 Revocation, amendment, or waiver of rules.
- 1201.13 Appeals by Board employees.

##### Petitions for Appeal of Agency Action; Pleadings

- 1201.21 Notice of appeal rights.
- 1201.22 Filing petitions for appeal and responses to petitions.
- 1201.23 Computation of time.
- 1201.24 Content of petition for appeal; right to hearing.
- 1201.25 Content of agency response.
- 1201.26 Number of pleadings, service, and response.
- 1201.27 Class appeals.

##### Parties, Representatives and Witnesses

- 1201.31 Representation.
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- 1201.91 Explanation.
- 1201.92 Criteria for certifying interlocutory appeals.
- 1201.93 Procedures.

**Ex Parte Communications**

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- 1201.102 Prohibition on ex parte communications.
- 1201.103 Placing communications in the record; sanctions.

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- 1201.112 Jurisdiction of presiding official.
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**Subpart C—Petitions for Review of Initial Decisions**

- 1201.114 Filing petition for review and cross petition for review.
- 1201.115 Contents of petition for review.
- 1201.116 Procedures for review or reopening.
- 1201.117 Board reopening of case and reconsideration of initial decision.
- 1201.118 OPM petition for reconsideration.
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**Subpart D—Procedures for Original Jurisdiction Cases****Actions Brought by the Special Counsel**

- 1201.121 Scope of jurisdiction; compliance with subpart B.
- 1201.122 Filing complaints and requests; serving documents on parties.
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- 1201.131 Procedures.
- 1201.132 Board jurisdiction.
- 1201.133 Filing a complaint.
- 1201.134 Answer to complaint.
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- 1201.141 Right to hearing.

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- 1201.143 Appeal.

**Subpart E—Procedures for Cases Involving Allegations of Discrimination**

- 1201.151 Scope and policy.
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- 1201.153 Contents of petition.
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- 1201.161 Action by the Commission; judicial review.
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- 1201.171 Referral of case to Special Panel.
- 1201.172 Organization of Special Panel; designation of members.
- 1201.173 Practices and procedures of Special Panel.
- 1201.174 Enforcing the Special Panel decision.
- 1201.175 Judicial review of cases decided under 5 U.S.C. 7702

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- 1201.181 Authority and explanation.
- 1201.182 Petition for enforcement.
- 1201.183 Procedures.

**Subpart G—Savings Provisions**

- 1201.191 Savings provisions.

**Appendix I—Merit Systems Protection Board Appeals Form****Appendix II—Appropriate Regional Office For Filing Appeals****Appendix III—Approved Hearing Locations By Regional Office**

Authority: 5 U.S.C. 1204, and 7701 unless otherwise noted.

**Subpart A—Jurisdiction and Definitions****§ 1201.1 General.**

The Board has two types of jurisdiction, original and appellate.

**§ 1201.2 Original jurisdiction: Definition and scope of jurisdiction.**

The Board has original jurisdiction over cases in which the agency has taken no formal action with respect to an employee. These cases include the following:

- (a) Actions brought by the Board's Special Counsel;
- (b) Requests, by persons removed from the Senior Executive Service for

performance deficiencies, for informal hearings; and

(c) Actions taken against administrative law judges under 5 U.S.C. 7521.

**§ 1201.3 Appellate jurisdiction: Definition and scope of jurisdiction.**

(a) *Appellate jurisdiction generally.* The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions:

(1) Reduction in grade or removal for unacceptable performance (5 CFR Part 432; 5 U.S.C. 4303(e));

(2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 CFR Part 752, Subparts C and D; 5 U.S.C. 7512);

(3) Removal, or suspension for more than 14 days, of a career appointee in the Senior Executive Service (5 CFR Part 752, Subparts E and F; 5 U.S.C. 7541–7543);

(4) Reduction-in-force action affecting a career appointee in the Senior Executive Service (5 U.S.C. 3595);

(5) Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 CFR 531.410; 5 U.S.C. 5335(c));

(6) Determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employees' Retirement System (5 CFR Parts 831 and 842; 5 U.S.C. 8347(d)(1)–(2) and 8461(e)(1));

(7) Disqualification of an employee or applicant because of a suitability determination (5 CFR 731.401);

(8) Termination of employment during probation or the first year of a veterans readjustment appointment, when the employee alleges discrimination because of partisan political reasons or marital status, or, if the termination was based on conditions arising before appointment, when the employee alleges that the action is procedurally improper (5 CFR 315.808, 5 U.S.C. 2014(b)(1)(D));

(9) Termination of appointment during a managerial or supervisory probationary period when the employee alleges discrimination because of partisan political affiliation or marital status (5 CFR 315.908(b));

(10) Separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901);



(11) Furlough of a career appointee in the Senior Executive Service (5 CFR 359.805);

(12) Failure to restore a former employee to employment following military service, or following partial or full recovery from a compensable injury (5 CFR 353.401);

(13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force action, or after partial or full recovery from a compensable injury (5 CFR 302.501, 5 CFR 330.202);

(14) Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961 (5 CFR 352.508);

(15) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR 352.209);

(16) Failure to re-employ a former employee after detail or transfer to an international organization (5 CFR 352.313);

(17) Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 CFR 352.707);

(18) Failure to re-employ a former employee after service under the Taiwan Relations Act (5 CFR 352.807); and

(19) Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104).

(b) *Appeals involving an allegation that the action was based on appellant's "whistleblowing."* Appeals of actions appealable to the Board under any law, rule, or regulation, in which the appellant alleges that the action was taken because of the appellant's "whistleblowing" (a violation of the prohibited personnel practice described in 5 U.S.C. 2302(b)(8)), are governed by part 1209 of this title. The provisions of Subparts B, C, E, F, and G of this Part 1201 apply to appeals and stay requests governed by Part 1209 unless other specific provisions are made in that part.

(c) *Limitations on appellate jurisdiction, collective bargaining agreements, and election of procedures:*

(1) For an employee covered by a collective bargaining agreement under 5 U.S.C. 7121, the negotiated grievance procedures contained in the agreement are the exclusive procedures for resolving any action that could otherwise be appealed to the Board, with the following exceptions:

(i) An appealable action involving discrimination under 5 U.S.C. 2302(b)(1), reduction in grade or removal under 5

U.S.C. 4303, or adverse action under 5 U.S.C. 7512, may be raised under the Board's appellate procedures, or under the negotiated grievance procedures, but not under both;

(ii) Any appealable action that is excluded from the application of the negotiated grievance procedures may be raised only under the Board's appellate procedures.

(2) *Choice of procedure.* When an employee has a choice of raising an appealable action under the Board's appeal procedures or under negotiated grievance procedures, the Board considers the choice between those procedures to have been made when the employee timely files an appeal with the Board or timely files a written grievance, whichever event occurs first.

(3) *Review of discrimination grievances.* If an employee chooses the negotiated grievance procedure under paragraph (c)(2) of this section and alleges discrimination as described at 5 U.S.C. 2302(b)(1), then the employee, after having obtained a final decision under the negotiated grievance procedure, may ask the Board to review that final decision. The request must be filed with the Clerk of the Board in accordance with § 1201.154.

(d) *Appealability not affected by retirement status or election.* In determining the appealability of an action to the Board under any law, rule, or regulation, neither the status of the appellant under any retirement system established under a federal statute nor any election made by the appellant under such system may be taken into account.

#### § 1201.4 General definitions.

(a) *Presiding official.* Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board.

(b) *Pleading.* Written submission setting out claims, allegations, arguments, or evidence. Pleadings include briefs, motions, petitions, attachments, and responses.

(c) *Motion.* A request, submitted to a presiding official, that the presiding official take a particular action.

(d) *Appropriate regional office.* The regional office of the Board that has jurisdiction over the area where the appellant's duty station was located when the agency took the action. Appeals of Office of Personnel Management reconsideration decisions concerning retirement benefits, and appeals of adverse suitability determinations under 5 CFR Part 731,

must be filed with the regional office that has jurisdiction over the area where appellant lives. Appendix II of these regulations lists the geographic areas over which each of the Board's regional offices has jurisdiction. Appeals, however, may be transferred from one regional office to another.

(e) *Party.* A person, an agency, or an intervenor, who is participating in a Board proceeding. This term applies to the Office of Personnel Management and to the Office of the Special Counsel when those organizations are participating in a Board proceeding.

(f) *Petition for appeal.* A request review of an agency action.

(g) *Petition for review.* A request for review of an initial decision of a presiding official.

(h) *Day.* Calendar day.

(i) *Service.* The process of furnishing a copy of any pleading to Board officials, other parties, or both, either by mail or by personal delivery.

(j) *Date of service.* The date on which documents are served on Board officials, other parties, or both.

(k) *Certificate of Service.* A document certifying that a party has served copies of pleadings on Board officials, other parties, or both.

(l) *Date of filing.* A document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days before its receipt.

### Subpart B—Procedures for Appellate Cases

#### General

##### § 1201.11 Scope and policy.

The regulations in this subpart apply to Board appellate proceedings except as otherwise provided in § 1201.13. The regulations in this subpart apply also to appellate proceedings and stay requests covered by Part 1209 unless other specific provisions are made in that part. These regulations also apply to original jurisdiction proceedings of the Board except as otherwise provided in Subpart D. It is the Board's policy that these rules will be applied in a manner that expedites the processing of each case, but with due regard to the rights of all parties.

##### § 1201.12 Revocation, amendment, or waiver of rules.

The Board may revoke, amend, or waive any of these regulations as they apply generally to all cases. A presiding



official may waive a Board regulation as that regulation applies to a matter pending before him or her. The presiding official must give notice of the waiver to all parties, but is not required to give the parties an opportunity to respond. A presiding official may waive a regulation for good cause shown unless a statute requires application of the regulation.

#### § 1201.13 Appeals by Board employees.

Appeals by Board employees will be filed with the Clerk of the Board and will be assigned to an administrative law judge for adjudication under this subchapter. The Board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. Accordingly, the Board will not disturb initial decisions in those cases unless the party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law. In addition, the Board, as a matter of policy, will not rule on any interlocutory appeals or motions to disqualify the administrative law judge assigned to those cases until the initial decision has been issued.

#### Petitions for Appeal of Agency Action; Pleadings

##### § 1201.21 Notice of appeal rights.

When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:

- (a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;
- (b) A copy, or access to a copy, of the Board's regulations;
- (c) A copy of the appeal form in Appendix I of this part; and
- (d) Notice of any right the employee has to file a grievance.

##### § 1201.22 Filing petitions for appeal and responses to petitions.

(a) *Place of filing.* Petitions for appeal, and responses to those petitions, must be filed with the appropriate Board regional office. See § 1201.4(e) of this part.

(b) *Time of filing.* A petition for appeal must be filed during the period beginning on the day after the effective date of the action being appealed and ending 20 days after the effective date. A petition for appeal from a final or reconsideration decision that does not set an effective date must be filed within 25 days of the date of the issuance of the

decision. (Paragraphs (a) (5), (6), (7), (12), (13), (14), (15), (16), (17), and (18) of § 1201.3 of this part list actions covered by the latter rule.) A response to a petition for appeal must be filed within 20 days of the date of the Board's acknowledgment order.

(c) *Timeliness of petitions for appeal.* Failure to file a petition for appeal within the time limit set by statute, regulation, or order of a presiding official will, absent a showing of good cause, result in a dismissal of the appeal as untimely filed. The presiding official or the Board will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

(d) *Method of filing.* Filing must be made either by personal delivery to the appropriate Board office during normal business hours or by mail addressed to that office.

##### § 1201.23 Computation of time.

In computing the number of days allowed for filing a submission, the first day counted is the day after the event from which the time period begins to run. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date.

*Example:* If an employee receives a decision notice that is effective on June 1, the 20-day period for filing an appeal starts to run on June 2. The filing ordinarily would be timely only if it is made by June 21. If June 21 is a Saturday, however, the last day for filing would be Monday, June 23.

##### § 1201.24 Content of petition for appeal; right to hearing.

(a) *Content.* Only an appellant, his or her designated representative, or a party properly substituted under § 1201.35 may file a petition for appeal. Petitions may be in any format, including letter form, but they must contain the following:

- (1) The name, address, and telephone number of the appellant, and the name and address of the agency that took the action;
- (2) A description of the action the agency took and its effective date;
- (3) A request for hearing if the appellant wants one;
- (4) A statement of the reasons why the appellant believes the agency action is wrong;
- (5) A statement of the action the appellant would like the presiding official to order;
- (6) The name, address, and telephone number of the appellant's representative, if the appellant has a representative;

(7) The notice of the decision to take the action being appealed, along with any relevant documents;

(8) A statement telling whether the appellant or anyone acting on his or her behalf has filed a grievance or a formal discrimination complaint with any agency regarding this matter; and

(9) Original signatures of the appellant and, if the appellant has a representative, of the representative.

(b) Failure to state a claim or defense in the petition will not preclude the appellant from raising that claim or defense later unless a party shows that the late submission would prejudice the rights of the other parties or substantially delay the proceedings.

(c) *Use of Board form.* An appellant may comply with paragraph (a) of this section, and with § 1201.31 of this part if a representative is designated in the form, by completing the form in Appendix I of this part, if appropriate.

(d) *Right to hearing.* Under 5 U.S.C. 7701, an appellant has a right to a hearing.

(e) *Timely request.* The appellant must submit any request for a hearing with the petition for appeal, or within any other time period the presiding official sets for that purpose. If the appellant does not request a hearing, the presiding official may adjudicate the appeal on the record without holding a hearing.

##### § 1201.25 Content of agency response.

The agency response to a petition for appeal must contain the following:

- (a) The name of the appellant and of the agency whose action the appellant is appealing;
- (b) A statement identifying the agency action taken against the appellant and stating the reasons for taking the action;
- (c) A specific response admitting, denying, or explaining, in whole or in part, each allegation in the appellant's petition;
- (d) All documents contained in the agency record of the action;
- (e) Designation of and signature by the authorized agency representative; and
- (f) Any other documents or responses requested by the Board.

##### § 1201.26 Number of pleadings, service, and response.

(a) *Number.* The appellant must file one original and one copy of the petition for appeal with the appropriate Board office. Each party who makes an additional submission must file one original of it.

(b) *Service.* (1) *Service by the Board.* The appropriate office of the Board will



mail a copy of the petition for appeal to each party to the proceeding other than the appellant. It will attach to each copy a service list, consisting of a list of the names and addresses of the parties to the proceeding or their designated representatives.

(2) *Service by the parties.* The parties must serve on each other one copy of each pleading, as defined by § 1201.4(c), except for petitions for appeal. They may do so by mailing the copy or by delivering it personally to each party on the service list previously provided to them. A certificate of service stating how and when service was made must accompany each pleading. The parties must notify the appropriate Board office and one another, in writing, of any changes in the names or addresses on the service list.

(c) *Paper size.* Pleadings and attachments must be filed on 8½ by 11-inch paper. This requirement enables the Board to comply with standards established for U.S. courts.

#### § 1201.27 Class appeals.

(a) *Petition.* One or more employees may file an appeal as representatives of a class of employees. The presiding official will hear the case as a class appeal if he or she finds that a class appeal is the fairest and most efficient way to adjudicate the appeal and that the representative parties will adequately protect the interests of all parties. When a petition for class appeal is filed, the time from the filing date until the presiding official issues his or her decision under paragraph (b) of this section is not counted in computing the time limit for individual members of the potential class to file individual appeals.

(b) *Procedure.* The presiding official will consider the appellant's request and any opposition to that request, and will issue an order within 30 days after the petition is filed stating whether the appeal is to be heard as a class appeal. If the presiding official denies the petition, the appellants affected by the decision may file individual appeals within 25 days after the denial. Each individual appellant is responsible for either (1) filing an individual appeal within the original time limit, or (2) keeping informed of the status of a petition for class appeal and, if the petition for class appeal is denied, filing an individual appeal within the additional 25-day period.

(c) *Standards.* In determining whether it is appropriate to treat an appeal as a class action, the presiding official will be guided but not controlled by the applicable provisions of the Federal Rules of Civil Procedure.

### Parties, Representatives, and Witnesses

#### § 1201.31 Representation.

(a) A party to an appeal may be represented in any matter related to the appeal. The parties must designate their representatives, if any, in writing. Any change in representation, and any revocation of a designation of representative, also must be in writing. Notice of the change must be filed and served on the other parties in accordance with § 1201.26 of this part.

(b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the presiding official within 15 days after the date of service of the notice of designation. The presiding official will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the presiding official will give the party whose representative was disqualified a reasonable time to obtain another one.

(c) The presiding official, on his or her own motion, may disqualify a party's representative on the grounds described in paragraph (b) of this section.

#### § 1201.32 Witnesses; right to representation.

Witnesses have the right to be represented when testifying. The representative of a nonparty witness has no right to examine the witness or otherwise participate in the development of testimony.

#### § 1201.33 Federal witnesses.

Every Federal agency or corporation must make its employees or personnel available to furnish sworn statements or to appear as witnesses at the hearing when ordered by the presiding official to do so. When providing those statements or appearing at the hearing, witnesses will be in official duty status.

#### § 1201.34 Intervenor and amicus curiae.

(a) *Explanation of Intervention.* Intervenor are organizations or persons who want to participate in a proceeding because they believe the proceeding, or its outcome, may affect their rights or duties. Intervenor as a "matter of right" are those parties who have a statutory right to participate. "Permissive"

intervenor are those parties who may be permitted to participate if the proceeding will affect them directly and if intervention is otherwise appropriate under law. A request to intervene may be made by motion filed with the presiding official.

(b) *Intervenor as a matter of right.* (1) The Director of the Office of Personnel Management may intervene as a matter of right under 5 U.S.C. 7701(d)(1). The motion to intervene must be filed at the earliest practicable time.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this section, the Special Counsel may intervene as a matter of right under 5 U.S.C. 1212(c). The motion to intervene must be filed at the earliest practicable time.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(c) *Permissive intervenors.* (1) Any person may, by motion, ask the presiding official, or the Board in a petition for review, for permission to intervene. The motion must explain why the person should be permitted to intervene.

(2) A motion for permission to intervene will be granted where the requester will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may request permission to intervene. A presiding official's denial of a motion for permissive intervention may be appealed to the Board under § 1201.91 of this part.

(d) *Role of intervenors.* Intervenor have the same rights and duties as parties, with the following two exceptions:

(1) Intervenor do not have an independent right to a hearing; and

(2) Permissive intervenors may participate only on the issues affecting them. The presiding official or the Board, as appropriate, is responsible for determining the issues on which permissive intervenors may participate.

(e) *Amicus curiae.* An *amicus curiae* is a person or organization that, although not a party to an appeal, gives advice or suggestions to the Board or presiding official regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may, in the discretion of the presiding official or the Board, be granted permission to file an *amicus curiae* brief.



**§ 1201.35 Substituting parties.**

(a) If an appellant dies or is otherwise unable to pursue the appeal, the processing of the appeal will be completed either upon substitution of a proper party or upon a determination that the original party's representative may continue to represent the party's interests. Any substitution will be made in accordance with existing law. Substitution will not be permitted where the interests of the appellant have terminated because of the appellant's death or other disability.

(b) The representative or proper party must file a motion for substitution within 90 days after the death or other disabling event.

(c) In the absence of a timely substitution of party, the processing of the appeal may continue if the interests of the proper party will not be prejudiced.

**§ 1201.36 Consolidating and joining appeals.**

(a) *Explanation.* (1) Consolidation occurs when the appeals of two or more parties are united for consideration because they contain identical or similar issues. For example, individual appeals arising from a single reduction in force might be consolidated.

(2) Joinder occurs when one person has filed two or more appeals and they are united for consideration. For example, a presiding official might join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent dismissal if the same appellant filed both appeals.

(b) *Action by presiding official.* A presiding official may consolidate or join cases on his or her own motion or on the motion of a party if doing so would:

- (1) Expedite processing of the cases; and
- (2) Not adversely affect the interests of the parties.

(c) Any objection to a motion for consolidation or joinder must be filed within 10 days of the date of service of the motion.

**§ 1201.37 Fees.**

(a) *Attorney fees.* Except as provided in paragraphs (a)(1) and (a)(2) of this section, the presiding official may require the agency to pay reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice.

(1) If an appellant is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the motion for an attorney fee award will be considered under the standards of

section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(2) If an appellant is the prevailing party in an appeal covered by 5 U.S.C. 1221(g) and the decision is based on the finding of any prohibited personnel practice under 5 U.S.C. 2302(b), the agency shall be liable for payment of reasonable attorney fees and any other reasonable costs incurred.

(3) Any request for payment of attorney fees must be made by motion. The motion must be filed with the presiding official within 20 days of the date on which an initial decision becomes final under § 1201.113 of this part or within 25 days of the date of a final decision under § 1201.116. The appellant must serve a copy of the motion on the agency. The agency may file a pleading responding to that motion within the time limit set by the presiding official. The motion must state why the appellant believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. That evidence must include, at a minimum:

- (i) Accurate and current time records;
- (ii) A copy of the terms of the fee agreement (if any); and
- (iii) The attorney's customary billing rate for similar work if the attorney has a billing practice or, in the absence of that practice, other evidence of the prevailing community rate that will establish a market value for the attorney's services. A petition for Board review of the presiding official's decision on the motion must be filed within 35 days of the date of that decision, and must comply with § 1201.114 of this part.

(b) *Witness fees.* (1) *Federal employees.* Employees of a Federal agency or corporation testifying in any Board proceeding or making a statement for the record will be in official duty status and will not receive witness fees.

(2) *Other witnesses.* Witnesses who are not covered by paragraph (b)(1) of this section are entitled to the same witness fees as those paid to subpoenaed witnesses under 28 U.S.C. 1821.

(3) *Payment of witness fees and travel costs.* The party requesting the presence of a witness must pay that witness' fees. Those fees must be paid or offered to the witness at the time the subpoena is served, or, if the witness appears voluntarily, at the time of appearance. A Federal agency or corporation is not required to pay or offer witness fees in advance. Applicable law and regulation govern payment of travel and per diem expenses.

**Presiding Officials****§ 1201.41 Presiding officials.**

(a) *Exercise of authority.* Presiding officials may exercise authority as provided in paragraphs (b) and (c) of this section on their own motion or on the motion of a party, as appropriate.

(b) *Authority.* Presiding officials will conduct fair and impartial hearings and will take all necessary action to avoid delay in all proceedings. They will have all powers necessary to that end unless those powers are otherwise limited by law. Presiding officials' powers include, but are not limited to, the authority to:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas under § 1201.81 of this part;

(3) Rule on offers of proof and receive relevant evidence;

(4) Rule on discovery motions under § 1201.73 of this part;

(5) After notice to the parties, order a hearing on his or her own initiative if the presiding official determines that a hearing is necessary;

(i) To resolve an important issue of credibility;

(ii) To ensure that the record on significant issues is fully developed; or

(iii) To otherwise ensure a fair and just adjudication of the case.

(6) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum, and exclude any disruptive persons from the hearing;

(7) Exclude from the hearing any witness whose later testimony might be affected by testimony of other witnesses or any persons whose presence might have a chilling effect on the testimony of another witness;

(8) Rule on all motions, witness and exhibit lists, and proposed findings;

(9) Require the parties to file memoranda of law and to present oral argument with respect to any question of law;

(10) Order the production of evidence and the appearance of witnesses whose testimony would be relevant, material, and nonrepetitious;

(11) Impose sanctions as provided under § 1201.43 of this part;

(12) Hold prehearing conferences for the settlement and simplification of issues;

(13) Require that all persons who can be identified from the record as being clearly and directly affected by a pending retirement-related case be notified of the appeal and of their right to request intervention so that their interests can be considered in the adjudication;

(14) Issue any order that may be necessary to protect a witness or other



individual from harassment and provide for enforcement of such order in accordance with subpart F;

(15) Issue initial decisions; and

(16) Determine, in decisions in which the appellant is the prevailing party, whether the granting of interim relief is appropriate.

(c) *Settlement.* (1) *Settlement discussion.* The presiding official may initiate attempts to settle the appeal informally at any time. The parties may agree to waive the prohibitions against *ex parte* communications during settlement discussions, and they may agree to any limits on the waiver.

(2) *Agreement.* If the parties agree to settle their dispute, the settlement agreement is the final and binding resolution of the appeal, and the presiding official will dismiss the appeal with prejudice.

(i) If the parties offer the agreement for inclusion in the record, and if the presiding official approves the agreement, it will be made a part of the record, and the Board will retain jurisdiction to ensure compliance with the agreement.

(ii) If the agreement is not entered into the record, the Board will not retain jurisdiction to ensure compliance.

#### § 1201.42 Disqualifying a presiding official.

(a) If a presiding official considers himself or herself disqualified, he or she will withdraw from the case, state on the record the reasons for doing so, and immediately notify the Board of the withdrawal.

(b) A party may file a motion asking the presiding official to withdraw on the basis of personal bias or other disqualification. This motion must be filed as soon as the party has reason to believe there is a basis for disqualification. The reasons for the request must be set out in an affidavit or in a signed and dated declaration or statement subscribed under penalty of perjury under 28 U.S.C. 1746.

(c) If the presiding official denies the motion, the party requesting withdrawal may request certification of the issue to the Board as an interlocutory appeal under § 1201.91 of this part. Failure to request certification is considered a waiver of the request for withdrawal.

#### § 1201.43 Sanctions.

The presiding official may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, the circumstances set forth in paragraphs (a), (b), and (c) of this section.

(a) *Failure to comply with an order.* When a party fails to comply with an order, the presiding official may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;

(3) Permit the requesting party to introduce secondary evidence concerning the information sought; and

(4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.

(b) *Failure to prosecute or defend appeal.* If a party fails to prosecute or defend an appeal, the presiding official may dismiss the appeal with prejudice or rule in favor of the appellant.

(c) *Failure to make timely filing.* The presiding official may refuse to consider any motion or other pleading that is not filed in a timely fashion in compliance with this subpart.

### Hearings

#### § 1201.51 Scheduling the hearing.

(a) The hearing will be scheduled not earlier than 15 days after the date of the hearing notice unless the parties agree to an earlier date. The agency, upon request of the presiding official, must provide appropriate hearing space.

(b) The presiding official may change the time, date, or place of the hearing, or suspend, adjourn, or continue the hearing. The change will not require the 15-day notice provided in paragraph (a) of this section.

(c) Either party may file a motion for postponement of the hearing. The motion must be made in writing and must either be accompanied by an affidavit or be submitted in accordance with 28 U.S.C. 1746, which requires a signed and dated declaration or statement subscribed under penalty of perjury. The affidavit or declaration must describe the reasons for the request. The presiding official will grant the request for postponement only upon a showing of good cause.

(d) The Board has established certain approved hearing locations, which are published as a notice in the *Federal Register*. See Appendix III. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board.

#### § 1201.52 Public hearings.

Hearings are open to the public. The presiding official may order a hearing or any part of a hearing closed, however, when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the presiding official's decision. Any objections to the order will be made a part of the record.

#### § 1201.53 Verbatim record.

(a) *Preparation.* A verbatim record of every hearing, made under the supervision of the presiding official, will be kept and will be the sole official record of the proceeding.

(b) *Copies.* Upon request, and upon payment of costs, a copy of a tape recording or transcript (if one is prepared) of the hearing will be made available to the parties. Parties must direct requests for copies of tape recordings or transcripts to the official hearing reporter.

(c) *Exceptions to payment of costs.* Exceptions to the payment requirement may be granted under extenuating circumstances for good cause shown. A motion for an exception must be filed with the presiding official. The reasons for the request must be set out in an affidavit or in a signed and dated declaration or statement subscribed under penalty of perjury under 28 U.S.C. 1746.

(d) *Corrections.* Corrections of the official transcript may be permitted on motion by a party or on the presiding official's own motion. Motions for corrections must be filed within 10 days after the receipt of a transcript. Corrections of the official transcript will be permitted only when errors of substance are involved and only on approval of the presiding official.

#### § 1201.54 Official record.

Exhibits and the verbatim record of testimony, if a hearing is held, together with all pleadings filed during the appellate proceedings, and all orders and decisions of the presiding official and the Board, constitute the exclusive and official record of the case.

#### § 1201.55 Motions.

(a) *Form.* All motions, except those made during a prehearing conference or a hearing, must be in writing. All motions must include a statement of the reasons supporting them. Written motions must be filed with the presiding official or the Board, as appropriate, and must be served upon all other parties in accordance with § 1201.26(b)(2) of this part. A party filing a motion for



extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.

(b) *Objection.* Unless the presiding official provides otherwise, and unless the motion is one for payment of attorney fees under § 1201.37(a) of this part, any objection to a written motion must be filed within 10 days from the date of service of the motion. Presiding officials, in their discretion, may grant or deny motions for extensions of time to file pleadings without providing any opportunity to respond to the motions.

(c) *Motions for extension of time.* Motions for extension of time will be granted only on a showing of good cause.

(d) *Motions for protective orders.* A motion for an order under 5 U.S.C. 1204(e)(1)(B) to protect a witness or other individual from harassment must be filed as early in the proceeding as practicable. The party seeking a protective order must include a concise statement of reasons justifying the motion, together with any relevant documentary evidence. An agency, other than the Office of Special Counsel, may not request such an order with respect to an investigation by the Special Counsel during such investigation. An order issued under this paragraph may be enforced in the same manner as provided under Subpart F for Board final decisions and orders.

#### § 1201.56 Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof.* (1) *Agency:* Under 5 U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (b) of this section, the agency action must be sustained if:

(i) It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant:* The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

- (i) Issues of jurisdiction;
- (ii) The timeliness of the appeal; and
- (iii) Affirmative defenses.

In appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits. An appellant who has received

an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment.

(b) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at its decision;

(2) Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) *Definitions.* The following definitions apply to this part:

(1) *Substantial evidence:* The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even through other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(2) *Preponderance of the evidence:* The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(3) *Harmful error:* Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

#### § 1201.57 Order of hearing.

(a) In cases in which the agency has taken an action against an employee, the agency will present its case first.

(b) The appellant will proceed first at hearings convened on the issues of:

- (1) Jurisdiction;
- (2) Timeliness; or
- (3) Office of Personnel Management disallowance of retirement benefits, when the appellant applied for those benefits.

(c) The presiding official may vary the normal order of presenting evidence.

#### § 1201.58 Closing the record.

(a) When there is a hearing, the record ordinarily will close at the conclusion of the hearing. When the presiding official allows the parties to submit argument, briefs, or documents previously identified for introduction into evidence,

however, the record will remain open for as much time as the presiding official grants for that purpose.

(b) If the appellant waives the right to a hearing, the record will close on the date the presiding official sets as the final date for the receipt of filing of submissions of the parties.

(c) Once the record closes, no additional evidence or argument will be accepted into the record unless the party submitting it shows that new and material evidence is available that was not readily available before the record closed. The presiding official will include in the record, however, any approved corrections of the transcript, if one has been prepared.

#### Evidence

##### § 1201.61 Serving documents on other parties.

The parties must serve all documents that they file with their pleadings on all other parties in accordance with § 1201.26(b)(2) of this part.

##### § 1201.62 Admissibility of evidence and testimony.

(a) The presiding official may exclude evidence or testimony from consideration if it is irrelevant, immaterial, or unduly repetitious.

(b) Any evidence and testimony that is offered in the hearing and excluded by the presiding official will be described, and that description will be made a part of the record.

##### § 1201.63 Presiding official's authority to order production of evidence.

At any stage of a proceeding, the presiding official may request further evidence concerning an issue, and may order its submission.

##### § 1201.64 Producing prior statements.

After an individual has given evidence in a proceeding, any party may request a copy of any prior signed statement made by that individual that is relevant to the evidence given. If the party refuses to furnish the statement, the presiding official may exclude the relevant evidence from consideration.

##### § 1201.65 Admitting facts and genuineness of documents.

(a) The presiding official may order any party to respond to a request that the party admit that relevant documents identified within the request are genuine, or that it admit the truth of any relevant matters of fact, or that it concur in the application of law to the facts as that application is stated in the request.

(b) Within the time period set by the presiding official, the party on whom the



request is served must file with the presiding official:

(1) A sworn statement specifically denying, admitting, or expressing a lack of knowledge regarding the specific matters on which an admission is requested; and/or

(2) An objection to the request in whole or in part on the ground that the matters contained in the request are privileged, irrelevant, or otherwise improper.

#### § 1201.66 Stipulations.

The parties may stipulate to any matter of fact. The stipulation will satisfy a party's burden of proving the fact alleged.

#### § 1201.67 Official notice.

Official notice is the Board's or presiding official's recognition of certain facts without requiring evidence to be introduced establishing those facts. The presiding official, on his or her own motion or on the motion of a party, may take official notice of matters of common knowledge or matters that can be verified. The parties will be given an opportunity to object to the taking of official notice. The taking of official notice of any fact satisfies a party's burden of proving that fact.

#### Discovery

#### § 1201.71 Purpose of discovery.

Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected to start and complete discovery with a minimum of Board intervention.

#### § 1201.72 Explanation and scope of discovery.

(a) *Explanation.* Discovery is the process, apart from the hearing, by which a party may obtain relevant information from another person, including a party, that the other person has not otherwise provided. Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence. This information is obtained to assist the parties in preparing and presenting their cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board. Those

rules, however, are instructive rather than controlling.

(b) *Scope.* Discovery covers any nonprivileged matter that is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts. Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal.

(c) *Methods.* Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission. Failure to deny a request for admission will not be considered a binding admission.

#### § 1201.73 Discovery procedures.

(a) *Discovery from a party.* A party seeking discovery from another party must start the process by serving a request for discovery on the other party. The request for discovery—

(1) Must state the time limit for responding, as prescribed in § 1201.73(d), and

(2) In the case of a request for a deposition of a party or of an employee of a Federal agency that is a party:

(i) Must specify the time and place of the taking of the deposition, and

(ii) Also must be served on the person to be deposed. When a party directs request for discovery to an officer or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency.

(b) *Discovery from a nonparty, including a nonparty Federal agency.* Parties should try to obtain voluntary discovery from nonparties whenever possible. A party seeking discovery from a nonparty Federal agency or employee must start the process by serving a request for discovery on the nonparty Federal agency or employee. A party may begin discovery from other nonparties by serving a request for discovery on the nonparty directly. If the party seeking the information does not make that request, or if it does so but fails to obtain voluntary cooperation, it may obtain discovery from a nonparty by filing a written motion with the presiding official, showing the

relevance, scope, and materiality of the particular information sought. If the party seeks to take a deposition, it should state in the motion the date, time, and place of the proposed deposition. An authorized official of the Board will issue a ruling on the motion, and will serve the ruling on the moving party. That official also will provide that party with a subpoena, if approved, that is directed to the individual or entity from which discovery is sought. The subpoena will specify the manner in which the party may seek compliance with it, and it will specify the time limit for seeking compliance. The party seeking the information is responsible for serving any Board-approved discovery request and subpoena on the individual or entity, or for arranging for their service.

(c) *Responses to discovery requests.*

(1) A party, or a Federal agency that is not a party, must answer a discovery request within the time provided under paragraph (d)(2) of this section, either by furnishing to the requesting party the information or testimony requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for the objection.

(2) If a party fails or refuses to respond in full to a discovery request, or if a nonparty fails or refuses to respond in full to a Board-approved discovery order, the requesting party may file a motion to compel discovery. The requesting party must file the motion with the presiding official, and must serve a copy of the motion on the other party and on any nonparty entity or person from whom the discovery was sought. The motion must be accompanied by:

(i) A copy of the original request and a statement showing that the information sought is relevant and material; and

(ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit supporting the statement.

(3) The other party and any other entity or person from whom discovery was sought may respond to the motion to compel discovery within the time limits stated in paragraph (d)(4) of this section.

(d) *Time limits.* (1) Parties who wish to make discovery requests or motions must serve their initial requests or motions within 25 days after the date on which the presiding official issues an order to the respondent agency to produce the agency file and response.



(2) A party or nonparty must file a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the presiding official. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place.

(3) Any motion to depose a nonparty (along with a request for a subpoena) must be submitted to the presiding official within the time limits stated in paragraph (d)(1) of this section or as the presiding official otherwise directs.

(4) Any motion for an order to compel discovery must be filed with the presiding official within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel discovery must be filed with the presiding official within 10 days of the date of service of the motion.

(5) Discovery must be completed within the time the presiding official designates, but no later than 65 days after the appeal has been filed. The presiding official may establish a different time limit after due consideration of the particular situation, including the dates set for hearing and for closing the case record.

#### § 1201.74 Orders for discovery.

(a) *Motion for an order compelling discovery.* Motions for orders compelling discovery and motions for the appearance of nonparties must be filed with the presiding official in accordance with §§ 1201.73(c)(2) and 1201.73(d)(4).

(b) *Content of order.* Any order issued will include, where appropriate:

(1) A provision that the person to be deposed must be notified of the time and place of the deposition;

(2) Any conditions or limits concerning the conduct or scope of the proceedings or the subject matter that may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment, or oppression;

(3) Limits on the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(4) Other restrictions upon the discovery process that the presiding official sets.

(c) *Noncompliance.* Failure to comply with an order compelling discovery may

cause the noncomplying party to be subjected to sanctions under § 1201.43 of this part.

#### § 1201.75 Taking depositions.

Depositions may be taken before any person who has no interest in the outcome of the proceedings and who is authorized by law to administer oaths.

#### Subpoenas

##### § 1201.81 Requests for subpoenas.

(a) *Request.* Parties who wish to obtain subpoenas that would require the attendance and testimony of witnesses, or subpoenas that would require the production of documents or other evidence under 5 U.S.C. 1204(b)(2)(A), should file their motions for those subpoenas with the presiding official. Subpoenas are not ordinarily required to obtain the attendance of Federal employees as witnesses.

(b) *Form.* Parties requesting subpoenas must file their requests, in writing, with the presiding official. Each request must identify specifically the books, papers, or testimony desired. In addition, it must be supported by a showing that the evidence sought is generally relevant and that the scope of the request is reasonable, and by a statement of the facts expected to be proven by the evidence.

(c) *Rulings.* Any presiding official who does not have the authority to issue subpoenas will refer the request to an official with authority to rule on the request, with a recommendation for decision. The official to whom the request is referred will rule on the request promptly. Presiding officials who have the authority to rule on these requests themselves will do so directly.

##### § 1201.82 Motions to quash subpoenas.

Any person to whom a subpoena is directed, or any party, may file a motion to quash or limit the subpoena. The motion must be filed with the presiding official, and it must include the reasons why compliance with the subpoena should not be required or the reasons why the subpoena's scope should be limited.

##### § 1201.83 Serving subpoenas.

(a) Any person who is at least 18 years of age and who is not a party to the appeal may serve a subpoena. This category includes private process servers and other persons authorized to serve process in actions brought in state courts of general jurisdiction or in Federal courts. The party who requested the subpoena, and to whom the subpoena has been issued, is responsible for serving the subpoena.

(b) A subpoena directed to an individual outside the territorial jurisdiction of any court of the United States may be served in the manner described by the Federal Rules of Civil Procedure for service of a subpoena in a foreign country.

##### § 1201.84 Proof of service.

The person who has served the subpoena must certify that he or she did so: (a) By delivering it to the witness in person, (b) by registered or certified mail, or (c) by delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended. The document in which the party makes this certification also must include a statement that the prescribed fees have been paid or offered.

##### § 1201.85 Enforcing subpoenas.

(a) If a person who has been served with a Board subpoena fails or refuses to comply with its terms, the party seeking compliance may file a written motion for enforcement with the presiding official or make an oral motion for enforcement while on the record at a hearing. That party must present the document certifying that the subpoena was served and, except where the witness was required to appear before the presiding official, must submit an affidavit describing the failure or refusal to obey the subpoena. The Board, in accordance with 5 U.S.C. 1204(c), may then ask the appropriate United States district court to enforce the subpoena. If the person who has failed or refused to comply with a Board subpoena is located in a foreign country, the U.S. District Court for the District of Columbia will have jurisdiction to enforce compliance, to the extent that a U.S. court can assert jurisdiction over an individual in the foreign country.

(b) Upon application by the Special Counsel, the Board may seek court enforcement of a subpoena issued by the Special Counsel in the same manner in which it seeks enforcement of Board subpoenas, in accordance with 5 U.S.C. 1212(b)(3).

#### Interlocutory Appeals

##### § 1201.91 Explanation.

An interlocutory appeal is an appeal to the Board of a decision made by a presiding official during a proceeding. The presiding official may permit the appeal if he or she determines that the issue presented in it is of such importance to the proceeding that it requires the Board's immediate



attention. Either party may make a motion for certification of an interlocutory appeal. In addition, the presiding official, on his or her own motion, may certify an interlocutory appeal to the Board. If the appeal is certified, the Board will decide the issue and the presiding official will act in accordance with the Board's decision.

#### § 1201.92 Criteria for certifying interlocutory appeals.

The presiding official will certify a ruling for review only if the record shows that:

(a) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and

(b) An immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public.

#### § 1201.93 Procedures.

(a) *Motion for certification.* A party seeking the certification of an interlocutory appeal must file a motion for certification within 10 days of the date of the determination to be appealed. The motion must be filed with the presiding official, and must include arguments in support of both the certification and the determination to be made by the Board. The opposing party may file objections within 10 days of the date of service of the motion, or within any other time period that the presiding official may designate.

(b) *Certification and review.* The presiding official will grant or deny a motion for certification within five days after receiving all pleadings or, if no response is filed, within 10 days after receiving the motion. If the presiding official grants the motion for certification, he or she will refer the record to the Board. If the presiding official denies the motion, the party that sought certification may raise the matter at issue in a petition for review filed after the initial decision is issued, in accordance with §§ 1201.113 and 1201.114 of this part.

(c) *Rulings.* Rulings of the presiding official may not be appealed during the hearing unless the official certifies the ruling for review by the Board.

(d) *Stay of hearing.* The presiding official has the authority to stay the hearing while an interlocutory appeal is pending with the Board, or to proceed with the hearing during that time. Despite this authority, however, the Board may stay a hearing on its own motion while an interlocutory appeal is pending with it.

### Ex Parte Communications

#### § 1201.101 Explanation and definitions.

(a) *Explanation.* An ex parte communication is an oral or written communication between a decision-making official of the Board and an interested party to a proceeding, when that communication is made without providing the other parties to the appeal with a chance to participate. Not all ex parte communications are prohibited. Only those that involve the merits of the case, or those that violate other rules requiring submissions to be in writing, are prohibited. Accordingly, interested parties may ask about such matters as the status of a case, when it will be heard, and methods of submitting evidence to the Board. Parties may not ask about matters such as what defense they should use or whether their evidence is adequate, and they may not make a submission orally if that submission is required to be made in writing.

(b) *Definitions for purposes of this section.*

(1) "Interested party" includes:

(i) Any party or representative of a party involved in a proceeding before the Board; and

(ii) Any other person who might be affected by the outcome of a proceeding before the Board.

(2) "Decision-making official" means any presiding official, as well as any officer or other employee of the Board who reasonably can be expected to participate in the decision-making process of the Board.

#### § 1201.102 Prohibition on ex parte communications.

Except as otherwise provided in § 1201.41(c)(1) of this part, ex parte communications that concern the merits of any matter before the Board for adjudication, or that otherwise violate rules requiring written submissions, are prohibited from the time the persons involved know that the Board may consider the matter until the time the Board has issued a final decision on the matter.

#### § 1201.103 Placing communications in the record; sanctions.

(a) Any communication made in violation of § 1201.102 of this part will be made a part of the record. If the communication was oral, a memorandum stating the substance of the discussion will be placed in the record.

(b) If there has been a violation of § 1201.102 of this part, the presiding official or the Clerk of the Board, as appropriate, will notify the parties in

writing that the regulation has been violated, and will give the parties 10 days to file a response.

(c) The following sanctions are available:

(1) *Parties:* The offending party may be required to show why, in the interest of justice, his or her claim or motion should not be dismissed, denied, or otherwise adversely affected.

(2) *Board personnel:* Offending Board personnel will be treated in accordance with the Board's standards of conduct.

(3) *Other persons:* The Board may invoke appropriate sanctions against other offending parties.

### Final Decisions

#### § 1201.111 Initial decision by presiding official.

(a) The presiding official will prepare an initial decision after the record closes, and will serve that decision on the Clerk of the Board, on the Director of the Office of Personnel Management, and on all parties to the appeal, including named parties, permissive intervenors, and intervenors of right.

(b) Each initial decision will contain:

(1) Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record;

(2) The reasons or bases for those findings and conclusions;

(3) An order making final disposition of the case, including appropriate relief;

(4) A statement, if the appellant is the prevailing party, as to whether interim relief is provided effective upon the making of the decision, pending the outcome of any petition for review filed by another party under Subpart C of this part.

(5) The date upon which the decision will become final (a date that, for purposes of this section, is 35 days after issuance); and

(6) A statement of any further process available, including, as appropriate, a petition for enforcement under § 1201.182 of this part, a petition for review under § 1201.114, and a petition for judicial review.

(c) *Interim relief.* Under 5 U.S.C. 7701(b)(2), if the appellant is the prevailing party, the appellant will be granted the relief provided in the initial decision effective upon the making of the decision and remaining in effect pending the outcome of any petition for review, unless the presiding official determines that the granting of such relief is not appropriate. Nothing in this paragraph shall be construed to require any payment of back pay or attorney fees before the decision of the Board becomes final.



### § 1201.112 Jurisdiction of presiding official.

After issuing the initial decision, the presiding official will retain jurisdiction over the case only to the extent necessary to correct the transcript, when one is obtained; to rule on motions for exceptions to the requirement that a party seeking a transcript must pay for it; to rule on a request by the appellant for attorney fees; and to process any petition for enforcement filed under Subpart F of this part.

### § 1201.113 Finality of decision.

The initial decision of the presiding official will become final 35 days after issuance. Initial decisions are not precedential.

(a) *Exceptions.* The initial decision will not become final if, within 35 days after issuance of the decision, any party files a petition for review, or if the Board reopens the case on its own motion.

(b) *Petition for review denied.* If the Board denies all petitions for review, the initial decision will become final when the Board issues its last decision denying a petition for review.

(c) *Petition for review granted or case reopened.* If the Board grants a petition for review or a cross petition for review, or if it reopens or dismisses a case, the decision of the Board is the final decision of the Board unless the decision states otherwise.

(d) *Extensions.* The Board may extend the 35-day time limit for filing a petition for good cause shown as specified in § 1201.114 of this part.

(e) *Exhaustion.* Administrative remedies are exhausted when a decision becomes final in accordance with this section.

### Subpart C—Petitions for Review of Initial Decisions

#### § 1201.114 Filing petition for review and cross petition for review.

(a) *Who may file.* Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel may file a petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain an original signature of the appellant or of the party's designated representative.

(b) *Cross petition for review.* If a party, the Director of OPM, or the Special Counsel files a timely petition for review, any other party, the Director of OPM, or the Special Counsel may file a timely cross petition for review. The

Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review.

(c) *Place for filing.* A petition for review, cross petition for review, responses to those petitions, and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, either by personal delivery during normal business hours or by mail addressed to the Clerk of the Board.

(d) *Time for filing.* Any petition for review must be filed within 35 days after the initial decision is issued. A cross petition for review must be filed within 25 days of service of the petition for review. Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. The date of filing by mail is the postmark date; if no legible postmark date appears on the mailing, the Board will presume that the document was mailed five days before it was received. If the document is delivered personally, the Board will consider it to have been filed on the date the Clerk of the Board received it.

(e) *Extension of time to file.* The Board will grant a motion for extension of time to file a petition for review, a cross petition, or a response only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must either be accompanied by an affidavit or be submitted in accordance with 28 U.S.C. 1746, which requires a signed and dated declaration or statement subscribed as true under penalty of perjury. The affidavit or declaration must include a specific and detailed description of the circumstances alleged to constitute good cause, and it must be accompanied by documentation or other evidence supporting the matters asserted.

(f) *Late filings.* Unless the Board has specifically granted an extension of time under paragraph (e) of this section, or unless a motion for extension is pending before the Board, any petition for review, cross petition for review, or response that is filed late must be accompanied by a motion for waiver that shows good cause for the untimely filing. The motion must either be accompanied by an affidavit or be submitted in accordance with 28 U.S.C.

1746, which requires a signed and dated declaration or statement subscribed as true under penalty of perjury. The affidavit or declaration must include:

(1) The reasons for failing to request an extension before the deadline for the submission; and

(2) A specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence. Any response to the motion for waiver may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (d) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion for waiver, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely.

(g) *Intervention.* (1) *By Director of OPM.* The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d), if he or she exercises that right as early in the proceeding as practicable. For purposes of this paragraph, if the Director did not intervene while the case was pending before the regional office, the notice of intervention is timely if it is filed with the Clerk of the Board within 20 days of the date of service of the cross petition or response to the petition for review, or, if no response is filed, within 20 days of the date on which it is due. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties.

(2) *By Special Counsel.* (i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (g)(2)(ii) of this section. For purposes of this paragraph, if the Special Counsel did not intervene while the case was pending before the regional office, the notice of intervention is timely if it is filed with the Clerk of the Board within 20 days of the date of service for the cross petition or response to the petition for review, or, if no response is filed, within 20 days of the date on which it is due. If the Special Counsel requests additional time for



filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(3) *Permissive intervenors.* Any person, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene.

(h) *Service.* For purposes of this section, service of a document occurs upon its filing, as that action is determined under paragraph (d) of this section. A party submitting a pleading must serve a copy of it on each party and on each representative on the service list for the initial decision. Service must be made either by mailing or by personal delivery. The submission must be accompanied by a certificate stating specifically how and when the service was made. Each party is responsible for notifying the Board and each other, in writing, of any changes in the names and addresses on the service list.

(i) *Closing the record.* The record closes on expiration of the period for filing the response to the petition for review, or to the cross petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record is closed, the Board will not consider additional evidence or argument unless a party shows that new and material evidence is available that was not available before the record closed.

#### § 1201.115 Contents of petition for review.

(a) The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.

(b)(1) If the appellant was the prevailing party in the initial decision, and that decision stated that the

appellant was granted interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by evidence that the agency has provided the interim relief required, except when the agency has made a determination as described in paragraph (b)(2) of this section.

(2) Under 5 U.S.C. 7701(b)(2), interim relief will not be granted fully if the initial decision provides that the appellant return to or be present at the place of employment pending the outcome of any petition for review and the agency determines that the return or presence of the appellant will be unduly disruptive to the work environment. If the agency makes such a determination, it must notify both the appellant and the presiding official in writing and must provide evidence of such notification to the Board at the time of filing a petition or cross petition for review. The evidence must show that the agency has provided that the appellant will receive pay, compensation, and all other benefits as terms and conditions of employment during the period a petition for review is pending.

(3) Nothing in paragraphs (b)(1) or (b)(2) of this section shall be construed to require any payment of back pay or attorney fees before the decision of the Board becomes final.

(4) Failure of the agency to submit evidence that it has complied with the granting of interim relief in accordance with paragraph (b)(1) of this section, or that it has provided notification that interim relief will not be granted fully in accordance with paragraph (b)(2) of this section, may result in the dismissal of the agency's petition or cross petition for review.

(c) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

#### § 1201.116 Procedures for review or reopening.

(a) In any case that is reopened or reviewed, the Board may:

(1) Issue a single decision that grants a petition for review, reopens the appeal, and decides the case;

(2) Hear oral arguments;

(3) Require that briefs be filed;

(4) Remand the appeal so that the presiding official may take further testimony or evidence or make further findings or conclusions; or

(5) Take any other action necessary for final disposition of the case.

(b) The Board may affirm, reverse, modify, or vacate the decision of the presiding official, in whole or in part. Where appropriate, the Board will issue a final decision and order a date for compliance with that decision.

#### § 1201.117 Board reopening of case and reconsideration of initial decision.

The Board may reopen an appeal and reconsider a decision of a presiding official on its own motion at any time, regardless of any other provisions of this part.

#### § 1201.118 OPM petition for reconsideration.

(a) *Criteria.* Under 5 U.S.C. 7703(d), the Director of the Office of Personnel Management may file a petition for reconsideration of a Board final order if he or she determines:

(1) That the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management; and

(2) That the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(b) *Time limit.* The Director must file the petition for reconsideration within 35 days after the date of service of the Board's final order.

(c) *Briefs.* After the petition is filed, the Board will make the official record relating to the petition for reconsideration available to the Director for review. The Director's brief in support of the petition for reconsideration must be filed within 20 days after the Board makes the record available for review. Any party's opposition to the petition for reconsideration must be filed within 25 days from the date of service of the Director's brief.

(d) *Stays.* If the Director of OPM files a petition for reconsideration, he or she also may ask the Board to stay its final order. An application for a stay, with a supporting memorandum, must be filed at the same time as the petition for reconsideration.

#### § 1201.119 Judicial review.

Any employee or applicant for employment who is adversely affected by a final order or decision of the Board under the provisions of 5 U.S.C. 7703 may obtain judicial review in the United States Court of Appeals for the Federal Circuit. As § 1201.175 of this part provides, an appropriate United States district court has jurisdiction over a request for judicial review of cases involving the kinds of discrimination issues described in 5 U.S.C. 7702.



## Subpart D—Procedures for Original Jurisdiction Cases

### Actions Brought by the Special Counsel

#### § 1201.121 Scope of jurisdiction; compliance with Subpart B.

(a) *Scope.* The Board has original jurisdiction over actions brought by the Special Counsel and over the Special Counsel's requests for stays of certain personnel actions.

(b) *Compliance with Subpart B.* Except as otherwise expressly provided by this subpart, the Special Counsel will comply with the regulations regarding hearing procedures that are set out in Subpart B of this part in connection with all complaints or requests he or she files with the Board.

#### § 1201.122 Filing complaints and requests; serving documents on parties.

(a) *Initial filing.* The Special Counsel must file two copies of each complaint or request, together with numbered and tabbed exhibits or attachments, if any, with the Clerk of the Board. In addition, he or she must file with that office, for service by the Board in accordance with paragraph (b) of this section, a sufficient number of copies of complaints or requests, together with numbered and tabbed exhibits and a certified list of parties or their representatives. The list must show the last known address of each party or representative.

(b) *Service by the Board.* The Board will mail copies of complaints and requests to the parties to the proceeding, or their representatives, at their last known addresses. It also will mail them any exhibits or attachments to the complaints and requests, along with copies of the pertinent regulations of the Board.

(c) *Subsequent filings and service.* Each party must serve on every other party one copy of each of its pleadings, as defined by § 1201.4(c). Service consists of mailing or delivering personally a copy of the pleading to each party on the service list previously provided by the Board. A certificate of service describing how and when service was made must accompany each pleading. All parties are responsible for notifying the Board and one another in writing of any changes in the names or addresses on the service list.

#### § 1201.123 Contents of complaint.

(a) If the Special Counsel determines that the Board should take any of the actions listed below, he or she must file a written complaint stating with particularity any alleged violations of law or regulation, along with the supporting facts.

(1) Action to require an agency to take action to correct a prohibited personnel practice (or a pattern of prohibited personnel practices) under 5 U.S.C. 1214(b)(4);

(2) Action to discipline an employee under 5 U.S.C. 1215(a);

(3) Action with respect to other matters within the jurisdiction of the Special Counsel under 5 U.S.C. 1216; and

(4) Action to discipline an employee under the Federal Employees Flexible and Compressed Work Schedule Act, 5 U.S.C. 6101.

(b) The Board may order the Special Counsel and the responding party to file briefs, memoranda, or both in any action the Special Counsel brings before the Board.

(c) If the Special Counsel files a corrective action with the Board on behalf of an employee, former employee, or applicant for employment who has sought corrective action from the Board directly under 5 U.S.C. 1214(a)(3), the Special Counsel must provide evidence that the employee, former employee, or applicant has consented to the Special Counsel's seeking corrective action. 5 U.S.C. 1214(a)(4).

#### § 1201.124 Rights of employees.

(a) When the Special Counsel files a complaint seeking corrective action under 5 U.S.C. 1214(b)(2)(B), the Board shall provide the individual alleged to have been the subject of the prohibited personnel practice the opportunity to make written comments.

(b) When the Special Counsel files a complaint proposing a disciplinary action against an employee under 5 U.S.C. 1215(a)(1), the employee has the right:

(1) To file an answer, supported by affidavits and documentary evidence;

(2) To be represented;

(3) To a hearing on the record before the Board or an administrative law judge;

(4) To a written Board decision, issued at the earliest practicable date, in which the Board states the reasons for its conclusion; and

(5) To a copy of any final order imposing disciplinary action.

#### § 1201.125 Answer to complaint.

(a) *Filing and default.* A party named in a Special Counsel complaint may file an answer with the Clerk of the Board within 35 days of the date of service of the complaint. If a party fails to answer, and does not show good cause for that failure, the failure will constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations are considered admitted and will form

the basis of a recommended or final decision as appropriate.

(b) *Content.* An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent has no knowledge of a fact, he or she must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer are considered true and may not be denied later.

#### § 1201.126 Final order of the Board.

(a) In any action seeking correction of a prohibited personnel practice, the Board may order the corrective actions it considers appropriate after providing an opportunity for the Special Counsel, the agency, and the Office of Personnel Management to comment. 5 U.S.C. 1214(b)(4)(A).

(b) (1) Subject to the provisions of paragraph (b)(2) of this section, in any case involving an alleged prohibited personnel practice described in 5 U.S.C. 2302 (b)(8), the Board will order such corrective action as the Board considers appropriate if the Special Counsel demonstrates that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was taken or is to be taken against the individual.

(2) Corrective action under paragraph (b)(1) of this section may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 5 U.S.C. 1214(b)(4)(B).

(c) In any action to discipline an employee, except as provided in paragraphs (e) and (f) of this section, the Board may order a removal, a reduction in grade, a debarment (not to exceed five years), a suspension, a reprimand, or an assessment of civil penalty not to exceed \$1,000. 5 U.S.C. 1215(a)(3).

(d) If a State or local agency fails to remove an employee whose removal is found to be warranted by the Board under 5 U.S.C. 1505, or if it reappoints such an employee within 18 months of a Board final order finding that removal was warranted, the Board may order the Federal agency administering loans or grants to the State or local agency, to withhold money from the agency. The amount to be withheld will not exceed two years of the offending employee's pay at the rate he or she was being paid at the time of the violation. 5 U.S.C. 1506.

(e) In any action to discipline an employee under the Federal Employees



Flexible and Compressed Work Schedule Act, 5 U.S.C. 6101, a final order of the Board may impose disciplinary action consisting of:

(1) Removal from Federal employment for any period of time the Board may prescribe;

(2) Suspension; or

(3) Other discipline that the Board considers appropriate.

(f) In any action in which the Board finds that an employee has violated 5 U.S.C. 7324, the Board will order the employee's removal, unless it finds by unanimous vote that the violation does not warrant removal and imposes instead a penalty of not less than 30 days suspension without pay.

**§ 1201.127 Requesting stay of personnel action; protective orders.**

Under 5 U.S.C. 1214(b)(1), the Special Counsel may ask a member of the Board to stay any personnel action if he or she determines that there are reasonable grounds to believe that the action was taken or is about to be taken as a result of a prohibited personnel practice.

(a) *Content of request.* The Special Counsel, or that official's representative, must sign each request, and must include the following information in the request:

(1) The names of the parties;

(2) The agency and officials involved;

(3) The nature of the action to be stayed;

(4) A concise statement of facts justifying the charge that the personnel action was or will be the result of a prohibited personnel practice; and

(5) The laws or regulations that were violated, or that will be violated if the stay is not issued.

(b) *Filing and serving of request.* The request for a stay must be filed and served on all parties in accordance with § 1201.122 of this part.

(c) *Action on the request for stay.* (1) *Initial stay.* Within three days after the filing of a request, excluding Saturdays, Sundays, and legal holidays, any member of the Board will grant a request for a stay of 45 days under 5 U.S.C. 1214(b)(1)(A) unless the Member determines that, under the facts and circumstances, the requested stay would not be appropriate. Unless the stay is denied within the 3-day period, it is considered granted by operation of law.

(2) *Extension of stay.* Upon the Special Counsel's request, the Board may extend any stay granted under 5 U.S.C. 1214(b)(1)(A) for whatever time it considers appropriate, but only after providing the Special Counsel and the agency with an opportunity to comment on the request, and only after the board has concurred in the request of the

Special Counsel. At the time he or she files a request for an extension of stay under 5 U.S.C. 1214(b)(1)(B), the Special Counsel must also file a brief describing the facts and any relevant legal authority that the Board should consider. The agency must respond in accordance with any order of the Board.

(3) *Reports during pendency of a stay.* If the Board grants an extension of the initial stay, the Special Counsel must report to the Board, at intervals specified in the order granting extension of the stay, regarding the status of the case. Such reports will continue to be required until the Special Counsel files a corrective action with the Board or requests termination of the stay, or until the stay expires according to its terms.

(4) *Termination of stay.* The Board may terminate a stay at any time, except it may not terminate a stay:

(i) On its own motion or on the motion of an agency without first providing notice and opportunity for oral or written comments to the Special Counsel and the individual on whose behalf the stay was ordered; or

(ii) On the motion of the Special Counsel without first providing notice and opportunity for oral or written comments to the individual on whose behalf the stay was ordered.

(d) *Additional information.* At any time, the board or, where appropriate, a member of the Board may require the Special Counsel, the agency, or both to appear and present further information or explanation regarding a request for a stay, to file supplemental briefs or memoranda, or to supply factual information that the Board needs in order to make a decision regarding a stay.

(e) *Protective orders.* The board, during an investigation by the Special Counsel or during the pendency of any Special Counsel proceeding before the Board, may issue any order that may be necessary to protect a witness or other individual from harassment. The Special Counsel must submit any motion for a protective order to the Clerk of the Board. The motion must include a concise statement of the reasons justifying the request, together with any relevant documentary evidence. An agency, other than the Office of the Special Counsel, may not request a protective order with respect to an investigation by the Special Counsel during such investigation. An order issued under this paragraph may be enforced in the same manner as provided under Subpart F for Board final decisions and orders.

**§ 1201.128 Administrative appeal; judicial review.**

(a) A party in a Special Counsel complaint does not have the right to file an administrative appeal from an order of the Board.

(b) An employee, former employee, or applicant for employment who is adversely affected by an order of the Board resulting from a corrective action brought by the Special Counsel may obtain judicial review of the order of the Board in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 1214(c).

(c) An employee subject to a final order imposing disciplinary action under 5 U.S.C. 1215 may obtain judicial review of the order of the Board in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 1215(a)(4).

**§ 1201.129 Presiding official; exceptions and replies to exceptions.**

(a) Except for requests for stays under 5 U.S.C. 1214(b)(1), and other matters specifically reserved for hearing by the Board, an action brought by the Special Counsel is heard by an administrative law judge, who will issue a recommended decision to the board in accordance with 5 U.S.C. 557. Unless directed otherwise, the parties must file all pleadings with the Clerk of the Board.

(b) The parties may file with the Clerk of the Board any exceptions they may have to the recommended decision of the administrative law judge. Those exceptions must be filed within 35 days after the date of service of the recommended decision.

(c) The parties may file replies to exceptions within 25 days after the date of service of the exceptions, as that date is determined by the certificate of service.

(d) No additional evidence will be accepted with a party's exceptions or with a reply to exceptions unless the party shows that the evidence is new and material evidence that was not available, despite due diligence, before the administrative law judge closed the record.

**Actions Against Administrative Law Judges**

**§ 1201.131 Procedures.**

When an agency proposes an action against an administrative law judge, the procedures established under Subpart B will apply to the hearing, unless these regulations expressly provide otherwise. Initial and subsequent pleadings, however, must be filed and served in accordance with § 1201.122 of this subpart.



**§ 1201.132 Board jurisdiction.**

The jurisdiction of the Board under this section is limited to proposals to take the following actions:

- (a) Removal;
- (b) Suspension;
- (c) Reduction in grade;
- (d) Reduction in pay; and
- (e) Furlough of 30 days or less.

**§ 1201.133 Filing a complaint.**

To initiate an action against an administrative law judge, an agency must file a complaint with the Board describing with particularity the facts that support the proposed action.

**§ 1201.134 Answer to complaint.**

The administrative law judge against whom the complaint is filed may file an answer to the complaint. The answer must comply with the timeliness and other requirements of § 1201.125 of this subpart.

**§ 1201.135 Presiding official; exceptions and replies to exceptions.**

(a) Unless it is specifically reserved for hearing by the Board, an action by an employing agency against an administrative law judge will be heard by an administrative law judge, who will issue a recommended decision in accordance with 5 U.S.C. 557. All pleadings in those actions must be filed with the Clerk of the Board.

(b) The parties may file with the Clerk of the Board any exceptions they have to the recommended decision of the administrative law judge. Those exceptions must be filed within 35 days after the date on which the administrative law judge issues the recommended decision.

(c) The parties may file replies to exceptions within 25 days from the date of service of the exceptions.

**§ 1201.136 Requirement for finding of good cause.**

The Board will authorize the agency to take a disciplinary action, and will specify the penalty to be imposed, only after the Board has made a finding of good cause as required by 5 U.S.C. 7521.

**Removal From the Senior Executive Service****§ 1201.141 Right to hearing.**

If an agency proposes to remove a career appointee from the Senior Executive Service under 5 CFR 359.502, and to place that employee in another civil service position, the appointee may request an informal hearing before an official appointed by the Board. If the appointee files the request with the Office of the Clerk at least 15 days

before the effective date of the proposed removal, the request will be granted.

**§ 1201.142 Hearing procedures; referring the record.**

The appointee, the appointee's representative, or both may appear and present arguments in an informal hearing before the Board or its designee. A verbatim record of the proceeding will be made. The appointee has no other procedural rights before the Board. The Board will refer a copy of the record to the Special Counsel, the Office of Personnel Management, and the employing agency for whatever action may be appropriate.

**§ 1201.143 Appeal.**

There is no right under 5 U.S.C. 7703 to appeal the agency's or Board's actions in cases arising under § 1201.141 of this part. The removal action will not be delayed as a result of the hearing.

**Subpart E—Procedures for Cases Involving Allegations of Discrimination****§ 1201.151 Scope and policy.**

(a) *Scope.* (1) The rules in this subpart implement 5 U.S.C. 7702. They apply to any case in which an employee or applicant for employment alleges that a personnel action appealable to the Board was based, in whole or in part, on prohibited discrimination.

(2) "Prohibited discrimination," as that term is used in this subpart, means discrimination prohibited by:

(i) Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(a));

(ii) Section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d));

(iii) Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791);

(iv) Sections 12 and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 631, 633a); or

(v) Any rule, regulation, or policy directive prescribed under any provision of law described in (i) through (iv) above.

(b) *Policy.* The Board's policy is to adjudicate impartially, thoroughly, and fairly all issues raised under this subpart. The Board will allow appellants an opportunity to raise allegations of discrimination during the appeals process and to present evidence supporting their claims.

**§ 1201.152 Compliance with subpart B procedures.**

Unless this subpart expressly provides otherwise, all actions involving allegations of prohibited discrimination

must comply with the regulations that are included in Subpart B of this part.

**§ 1201.153 Contents of petition.**

(a) *Contents.* A petition for appeal raising issues of prohibited discrimination must comply with § 1201.24 of this part, with the following exceptions:

(1) The petition must state that there was discrimination in connection with the matter appealed, and it must provide specific examples of how the agency discriminated against the appellant; and

(2) The petition must state whether the appellant has filed a formal discrimination complaint or a grievance with any agency. If he or she has done so, the petition must state the date on which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance.

(b) *Use of form.* Completing the form in Appendix I of these regulations constitutes compliance with paragraph (a) of this section.

**§ 1201.154 Time for filing petition; closing record in cases involving grievance decisions.**

Appellants who file petitions raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

(a) Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board within 20 days after the effective date of the agency action being appealed.

(b) If the appellant has filed a timely formal complaint of discrimination with the agency:

(1) A petition must be filed within 20 days after the appellant receives the agency resolution or final decision on the discrimination issue; or

(2) If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days.

(c) If the appellant files an appeal prematurely under this subpart, the presiding official will dismiss the appeal without prejudice to its later refile under §§ 1201.12 and 1201.22(b) of this part. If holding the petition for a short time would allow it to become timely, the presiding official, in his or her discretion, may hold the petition rather than dismiss it.

(d) If the appellant has filed a grievance with the agency under its



negotiated grievance procedure in accordance with 5 U.S.C. 7121, he or she may ask the Board to review the final decision under 5 U.S.C. 7702 within 20 days after the appellant receives that decision. The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain:

- (1) A statement of the grounds on which review is requested;
- (2) References to evidence of record or rulings related to the issues before the Board;
- (3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and
- (4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or tape recording of the hearing.

(e) In cases arising under paragraph (d) of this section, the record will close upon expiration of the period for filing the response to the petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, the Board will not consider additional evidence or argument unless a party shows that new and material evidence is available that was not available before the record closed.

**§ 1201.155 Allegations of discrimination not raised in petition.**

(a) *Timeliness.* An appellant may raise an allegation of discrimination at any time during the Board's consideration of an appeal of the agency's action, if the appellant did not know of the existence of a basis for the allegation at the time the petition for appeal was filed. The issue of discrimination may be excluded from consideration only if the agency shows that considering the issue would prejudice the agency's rights and unduly delay the proceedings, or if it shows that the discrimination issue is not directly related to the matter being appealed. If the issue of discrimination is excluded from consideration in the appeal, it will be remanded to the agency for appropriate consideration under any applicable law or regulation.

(b) *Effect.* When an appellant raises an allegation of prohibited discrimination that was previously raised before the agency, the presiding official will develop the record sufficiently to make a determination on the merits of the allegation. In developing the record under those circumstances, the time limits imposed

on the production of evidence and filing of memoranda may, in order to meet the statutory 120-day processing requirement, be much more constricted than those imposed in an appeal under 5 U.S.C. 7701.

(c) *Remand.* If the parties file a written agreement that the discrimination issue should be remanded to the agency for consideration, and if the presiding official determines that action would be in the interest of justice, the must be completed. In no instance will that time period exceed 120-days. While the issue is pending with the agency, the presiding official will retain jurisdiction over the appeal, and the appeal's adjudication will be suspended. When the agency has completed its consideration of the issue and returned that issue to the presiding official, that official will merge the appeal with the agency action on the issue, and will issue a decision within 120-days after the agency returned the issue.

(d) *Agency answer.* When an appellant alleges prohibited discrimination for the first time during a proceeding, and the matter is not remanded to the agency, the presiding official will give the agency a reasonable opportunity to refute the allegation.

**§ 1201.156 Time for processing appeals involving allegations of discrimination.**

(a) *Issue raised in petition.* When an appellant alleges prohibited discrimination in the petition for appeal, the presiding official will decide both the issue of discrimination and the appealable action within 120 days after the appeal is filed.

(b) *Issue not raised in petition.* When an appellant has not alleged prohibited discrimination in the petition for appeal, but has raised the issue later in the proceeding, the presiding official will decide both the issue of discrimination and the appealable action within 120 days after the issue is raised.

(c) *Discrimination issue remanded to agency.* When the presiding official remands an issue of discrimination to the agency, adjudication will be completed within 120 days after the agency completes its action and returns the case to the Board.

**§ 1201.157 Presiding official.**

In an appeal from a final decision or order issued under 5 U.S.C. 7121 or 7122 by an arbitrator or the Federal Labor Relations Authority, the presiding official will be an administrative law judge, the Board, a member of the Board, or another person the Board designates to hear the case.

**§ 1201.158 Notice of right to judicial review.**

Any final decision of the Board under 5 U.S.C. 7702 will notify the appellant of his or her right, within 30 days after receiving the Board's final decision, to petition the Equal Employment Opportunity Commission ("the Commission") to consider the Board's decision, or to file a civil action in an appropriate United States district court.

**Review of Board Decision**

**§ 1201.161 Action by the Commission; judicial review.**

(a) Time limit for determination. In cases in which an appellant petitions the Commission for consideration of the Board's decision under 5 U.S.C. 7702(b)(2), the Commission will determine, within 30 days after the date of petition, whether it will consider the decision.

(b) *Judicial review.* The Board's decision will become judicially reviewable on:

(1) The date on which the decision is issued, if the appellant does not file a petition with the Commission under 5 U.S.C. 7702(b)(1); or

(2) The date of the Commission's decision that it will not consider the petition filed under 5 U.S.C. 7702(b)(2).

(c) *Commission processing and time limits.* If the Commission decides to consider the decision of the Board, within 60 days after making its decision it will complete its consideration and either:

(1) Concur in the decision of the Board; or

(2) Issue in writing and forward to the Board for its action under § 1201.162 of this subpart another decision, which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law:

(i) The decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive related to prohibited discrimination; or

(ii) The Evidence in the record as a whole does not support the decision involving that provision.

(d) *Transmittal of record.* The Board will transmit a copy of its record to the Commission upon request.

(e) *Development of additional evidence.* When asked by the Commission to do so, the Board or a presiding official will develop additional evidence necessary to supplement the record. This action will be completed within a period that will permit the Commission to make its decision within the statutory 60-day time limit to which paragraph (c) of this section refers. The



Board or the presiding official may schedule additional proceedings if necessary in order to comply with the Commission's request.

(f) *Commission concurrence in Board decision.* If the Commission concurs in the decision of the Board under 5 U.S.C. 7702(b)(3)(A), the decision of the Board may be appealed to an appropriate United States district court.

**§ 1201.162 Board action on the Commission decision; judicial review.**

(a) *Board decision.* Within 30 days after receipt of a Commission; or

(2) To the extent that the Board finds that, as a matter of law:

(i) The Commission decision is based on an incorrect interpretation of any provision of any civil service law, rule, regulation, or policy directive, or

(ii) The evidence in the record as a whole does not support the Commission decision involving that provision, it may reaffirm the decision of the Board. In doing so, it may make revisions in the decision that it determines are appropriate.

(b) *Judicial review.* If the Board concurs in or adopts the decision of the Commission under paragraph (a)(1) of this section, the decision of the Board is a judicially reviewable action.

**§ 1201.165 Mixed cases governed by Reorganization Plan No. 1 of 1978.**

(a) *Definitions.* (1) *Prohibited discrimination* as used in this section means discrimination prohibited by section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(c)); section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791); and sections 12 and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 631, 633a).

(2) *Initial decision* as used in this section means a decision rendered by a presiding official of the MSPB pursuant to 29 CFR 1613 or 5 CFR Part 772 (as in effect prior to January 11, 1979) on an appeal in which issues of prohibited discrimination have been raised.

(3) *Preliminary decision as used in this section means:*

(i) An initial decision within the meaning of § 1201.165 (a)(2) which has not been reopened by a Board member or as to which no petition to reopen was filed by a party within 35 days after issuance of the decision;

(ii) A decision by the Board itself pursuant to 29 CFR Part 1613 or 5 CFR Part 772, in which issues of prohibited discrimination are addressed, or a decision by the Board denying all petitions to reopen.

(b) *Contents of petition.* A petition for appeal raising issues or prohibited

discrimination shall state there was discrimination in conjunction with the matter appealed and provide specific examples of how the appellant was discriminated against.

(c) *Procedures.* (1) Appeals under 29 CFR Part 1613 (formerly 5 CFR Part 713) Shall be processed by the Board consistent with the provisions set forth in that part. Such appeals shall be filed in writing with the appropriate Board Regional Office.

(2) Appeals under the provisions of 5 CFR Part 772 shall be processed as provided therein, except that under 5 CFR 772.306(b) the discrimination investigation shall be completed and the investigative file and report sent to the Board with 120 days. Except when this time has been extended upon a verified showing of good cause, the Board may impose the sanctions provided in 5 CFR 1201.43 if an agency fails to timely complete and file the result of such an investigation.

(3) An initial decision on an appeal which includes issues of prohibited personnel discrimination shall be rendered by an employee of the Board, pursuant to 29 CFR 1613 or 5 CFR Part 772, on all issues raised in the appeal.

(4) Unless a petition to reopen is filed with the Board or unless a Board member reopens on his/her own motion, within 35 days from issuance of an initial decision, the initial decision shall become the preliminary decision of the Board.

(d) *Review by EEOC.* (1) *Time for filing.* A petition to review the preliminary decision of the Board on issues of prohibited discrimination shall be filed with the EEOC within 35 days after initial decision of the Board becomes the preliminary decision.

(2) *Petition filed.* In the event a petition for review is filed with the EEOC, the Board decision shall become final on all issues, other than issues of prohibited discrimination, on the date EEOC's decision on these issues becomes final.

(3) *Petition not filed.* If a petition for review is not filed with the EEOC, the decision of the Board shall become final on all issues. (5 U.S.C. 1205(g)).

**Special Panel**

**§ 1201.171 Referral of case to special panel.**

If the Board reaffirms its decision under § 1201.162(a)(2) of this part with or without modification, it will certify the matter immediately to a special panel established under 5 U.S.C. 7702(d). Upon certification, the Board, within 5 days (excluding Saturdays, Sundays, and Federal holidays), will transmit the

administrative record in the proceeding to the chairman of the special panel and to the Commission. That record will include the following:

(a) The factual record compiled under this section, which will include a transcript of any hearing;

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

**§ 1201.172 Organization of Special Panel; designation of members.**

(a) A special panel is composed of:

(1) A Chairman, appointed by the President with the advice and consent of the Senate, whose term is six (6) years;

(2) One member of the Board, designated by the Chairman of the Board each time a panel is convened;

(3) One member of the Commission, designated by the Chairman of the Commission each time a panel is convened.

(b) *Designation of special panel members.* (1) *Time of designation.* Within 5 days of certification of a case to a special panel, the Chairman of Board and the Chairman of the Commission each will designate one member from his or her agency to serve on the special panel.

(2) *Manner of designation.* Letters designating the panel members will be served on the chairman of the panel and on the parties to the appeal.

**§ 1201.173 Practices and procedures of special panel.**

(a) *Scope.* The rules in this subpart apply to proceedings before a special panel.

(b) *Suspension of rules.* Unless a rule is required by statute, the chairman of a special panel may suspend the rule, in the interest of expediting a decision or for other good cause shown, and may conduct the proceedings in a manner he or she directs. The chairman may take this action at the request of a party, or on his or her own motion.

(c) *Time limit for proceedings.* In accordance with 5 U.S.C. 7702(d)(2)(A), the special panel will issue a decision within 45 days after a matter has been certified to it.

(d) *Administrative assistance to the special panel.*

(1) The Board and the Commission will provide the panel with the administrative resources that the chairman of the special panel determines are reasonable and necessary.



(2) Assistance will include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the Commission are responsible for all administrative costs the special panel incurs, and, to the extent practicable, they will divide equally the costs of providing administrative assistance. If the Board and the Commission disagree on the manner in which costs are to be divided, the chairman of the special panel will resolve the disagreement.

(e) *Maintaining the official record.* The Board will maintain the official record of the appeal. It will transmit two copies of each submission that is filed to each member of the special panel in an expeditious manner.

(f) *Filing and service of pleadings.* (1) The parties must file the original and six copies of each submission with the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue NW., Washington, DC 20419. The Office of the Clerk will serve one copy of each submission on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be made by mail or by personal delivery during the Board's normal business hours (8:30 a.m. to 5:00 p.m.). Because of the short statutory time limit for processing these cases, parties must file their submissions by overnight Express Mail, provided by the U.S. Postal Service, if they file their submissions by mail.

(4) A submission filed by Express Mail is considered to have been filed on the date of the Express Mail Order. A submission that is delivered personally is considered to have been filed on the date the Office of the Clerk of the Board receives it.

(g) *Briefs and responsive pleadings.* If the parties wish to submit written argument, they may file briefs with the special panel within 15 days after the date of the Board's certification order. Because of the short statutory time limit for processing these cases, the special panel ordinarily will not permit responsive pleadings.

(h) *Oral argument.* The parties have the right to present oral argument. Parties wishing to exercise this right must indicate this desire when they file their briefs or, if no briefs are filed, within 15 days after the date of the Board's certification order. Upon receiving a request for argument, chairman of the special panel will determine the time and place for argument and the amount of time to be allowed each side, and he or she will provide this information to the parties.

(i) *Postargument submission.* Because of the short statutory time limit for processing these cases, the parties may not file postargument submissions unless the chairman of the special panel permits those submissions.

(j) *Procedural matters.* Any procedural matters not addressed in these regulations will be resolved by written order of the chairman of the special panel.

#### **§ 1201.174 Enforcing the special panel decision.**

The Board, upon receipt of the decision of the special panel, will order the agency concerned to take any action appropriate to carry out the decision of the panel. The Board's regulations regarding enforcement of a final order of the Board apply to this matter. These regulations are set out in Subpart F of this part.

#### **§ 1201.175 Judicial review of cases decided under 5 U.S.C. 7702.**

(a) *Place and type of review.* The appropriate United States district court is authorized to conduct all judicial review of cases decided under 5 U.S.C. 7702. Those cases include appeals from actions taken under the following provisions: Section 717(c) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(c)); section 15(c) of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 633a(c)); and section 15(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)).

(b) *Time for filing request.* Regardless of any other provision of law, requests for judicial review of all cases decided under 5 U.S.C. 7702 must be filed within 30 days after the appellant received notice of the judicially reviewable action.

### **Subpart F—Enforcement of Final Decisions and Orders**

#### **§ 1201.181 Authority and explanation.**

(a) Under 5 U.S.C. 1204(a)(2), the Board has the authority to order any federal agency or employee to comply with decisions and orders issued under its jurisdiction, and the authority to enforce compliance with its orders and decisions. The parties are expected to cooperate fully with each other so that compliance with the Board's orders and decisions can be accomplished promptly and in accordance with the laws, rules, and regulations that apply to individual cases. The Board's decisions and orders will contain a notice of the Board's enforcement authority.

(b) In order to avoid unnecessary petitions under this subpart, the agency must inform the appellant promptly of

the actions it takes to comply, and it must tell the appellant when it believes it has completed its compliance. The appellant must provide all necessary information that the agency requests in order to comply, and, if not otherwise notified, he or she should, from time to time, ask the agency about its progress.

#### **§ 1201.182 Petition for enforcement.**

(a) *Appellate jurisdiction.* Any party may petition the Board for enforcement of a final decision issued under the Board's appellate jurisdiction. The petition must be filed promptly with the regional office that issued the initial decision; a copy of it must be served on the other party or that party's representative; and it must describe specifically the reasons the petitioning party believes there is noncompliance. The petition also must include the date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition.

(b) *Original jurisdiction.* Any party seeking enforcement of a Board order issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance.

(c) *Petition by an employee other than a party.* Under 5 U.S.C. 1204(e)(2)(B), any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board for enforcement. The Board will entertain a petition for enforcement from an aggrieved employee how is not a party only if the employee seeks and is granted party status as a permissive intervenor under 5 CFR 1201.34(c). The employee must file a motion to intervene at the time of filing the petition for enforcement. The petition and motion to intervene must be filed promptly with the regional office that issued the order or, if the order was issued by the Board, with the Clerk of the Board. The petitioner must serve a copy of the petition and motion to intervene on each party or the party's representative. The petition for enforcement must describe specifically why the petitioner believes there is noncompliance and in what way the petitioner is aggrieved by the noncompliance. The motion to intervene



will be considered in accordance with 5 CFR 1201.34(c).

(d) *Process.* Petitions for enforcement will be processed under the procedures described in § 1201.183 of this subpart.

#### § 1201.183 Procedures.

(a) *Initial Processing.* (1) When a party has filed a petition for enforcement of a final decision, the party that is alleged not to have complied must file one of the following within 15 days of the date of service of the petition: (i) Evidence of compliance; (ii) a statement of the compliance actions that the party has completed, the actions that are in process, and the actions that remain to be taken, along with a reasonable schedule for full compliance; or (iii) a statement showing good cause for the failure to comply completely with the decision of the Board. The party that filed the petition may respond to that submission within 10 days after the date of service of the submission. The parties must serve copies of their pleadings on each other as required under § 1201.26(b)(2) of this part.

(2) The regional director or a designated presiding official may convene a hearing if one is necessary to resolve matters at issue.

(3) If the regional director or designated presiding official finds that there has been compliance or a good faith effort to take all actions required to be in compliance with the final decision, he or she will state those findings in a decision. That decision will be subject to the procedures for petitions for review by the Board under subpart C of this part, and subject to judicial review under section 1201.119.

(4) If the regional director or designated presiding official finds that:

(i) The party that is alleged not to have complied has not taken, or has not made a good faith effort to take, any action required to be in compliance with the final decision, or

(ii) That party has taken or made a good faith effort to take one or more, but not all, actions required to be in compliance with the final decisions; he or she will issue a recommendation containing his or her findings, a statement of the actions required by the party to be in compliance with the final decision, and a recommendation that the Board enforce the final decision.

(5) If a recommendation described under paragraph (a)(4) of this section is issued, the party that is alleged not to have complied must do one of the following:

(i) If it decides to take the actions required by the recommendation, it must submit to the Clerk of the Board, within

15 days after the issuance of the recommendation, evidence that it has taken those actions.

(ii) If it decides not to take any of the actions required by the recommendation, it must file a brief supporting its nonconurrence in the recommendation. The brief must be filed with the Clerk of the Board within 30 days after the recommendation is issued and, if it is filed by the agency, it must identify by name, title, and grade the agency official responsible for the failure to take the actions required by the recommendation for compliance.

(iii) If the party decides to take one or more, but not all, actions required by the recommendation, it must submit both evidence of the actions it has taken and, with respect to the actions that it has not taken, a brief supporting its disagreement with the recommendation. The evidence and brief must be filed with the Clerk of the Board within 30 days after issuance of the recommendation and, if it is filed by the agency, it must contain the identifying information required by paragraph (a)(5)(ii) of this section.

(6) The petitioner may file a brief that responds to the submission described in paragraph (a)(5) of this section, and that asks the Board to review any finding in the recommendation, make under paragraph (a)(4)(ii) of this section, that the other party is in partial compliance with the final decision. The petitioner must file this brief with the Clerk of the Board within 20 days of the date of service of the submission described in paragraph (a)(5) of this section.

(b) *Consideration by the Board.* (1) The Board will consider the recommendation, along with the submissions of the parties, promptly. When appropriate, the Board may require the party that allegedly has not complied, or that party's representative, to appear before the Board to show why sanctions should not be imposed under 5 U.S.C. 1204(a)(2) and 1204(e)(2)(A) against the person responsible for the failure to comply. The Board also may require the party or its representative to make this showing in writing, or to make it both personally and in writing.

(2) The Board may hold a hearing on an order to show cause, or it may issue a decision without a hearing.

(3) The Board's final decision on the issues of compliance is subject to judicial review under section 1201.119 of this part.

(c) *Certification to the Comptroller General.* When appropriate, the Board may certify to the Comptroller General of the United States, under 5 U.S.C. 1204(e)(2)(A), that no payment is to be made to a certain Federal employee.

This order may apply to any Federal employee, other than a Presidential appointee subject to confirmation by the Senate, who is found to be in noncompliance with the Board's order.

(d) *Effect of Special Counsel's action or failure to act.* Failure by the Special Counsel to file a complaint under 5 U.S.C. 1215(a)(1)(C) and subpart D of this part will not preclude the Board from taking action under this subpart.

#### Subpart G—Savings Provisions

##### § 1201.191 Savings provisions.

(a) *Civil Service Reform Act of 1978 (Pub. L. 95-454).*

(1) *Scope.* All executive orders, rules and regulations relating to the Federal service that were in effect prior to the effective date of the Civil Service Reform Act shall continue in effect and be applied by the Board in its adjudications until modified, terminated, superseded, or repealed by the President, Office of Personnel Management, the Merit System Protection Board, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, as appropriate.

(2) *Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

(3) *Explanation.* Mr. X was advised of agency's intention to remove him for abandonment of position, effective December 29, 1978. Twenty days later Mr. X appealed the agency action to the Merit Systems Protection Board. The Merit Systems Protection Board docketed Mr. X's appeal as an "old system case," i.e., one to which the savings clause applied. The appropriate regional office processed the case, applying the substantive laws, rules and regulations in existence prior to the enactment of Act. The decision, dated February 28, 1979, informed Mr. X that he is entitled to judicial review if he files a timely notice of appeal in the appropriate United States district court or the United States Court of Claims under the statute of limitations



applicable when the adverse action was taken.

(b) *Whistleblower Protection Act of 1989* (Pub. L. 101-12).

(1) *Scope.* All orders, rules, and regulations issued by the Board and the Special Counsel before the effective date of the Whistleblower Protection Act of 1989 shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed by the Board or the Special Counsel, as appropriate.

(2) *Administrative proceedings and appeals therefrom.* No provision of the Whistleblower Protection Act of 1989 shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, including personnel actions that were proposed, threatened, or taken before July 9, 1989, the effective date of the Whistleblower Protection Act of 1989, and appeals before the Board or its predecessor agencies that were subject to judicial review on that date. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

## PART 1201

### Appendix II to Part 1201—Appropriate Regional Office for Filing Appeals

All submissions shall be addressed to the Regional Director, Merit Systems Protection Board, at the addresses listed below, according to geographic region of the employing agency or as required by § 1201.4(d) of this part. Address of Appropriate Regional Office and Area Served:

1. Atlanta Regional Office, Suite 500, 1365 Peachtree Street, NE., Atlanta, Georgia 30309-3199, (Alabama, Florida, Georgia, Mississippi, North Carolina, and South Carolina.)
2. Boston Regional Office, 10 Causeway Street, Room 1078, Boston, Massachusetts 02222-1042, (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.)
3. Chicago Regional Office, 230 South Dearborn Street, 31st Floor, Chicago, Illinois 60604-1669, (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.)
4. Dallas Regional Office, 1100 Commerce Street, Room 6F20, Dallas, Texas 75242-9979, (Arkansas, Louisiana, Oklahoma, and Texas.)
5. Denver Regional Office, 730 Simms Street, Suite 301, P.O. Box 25025, Denver, Colorado 80225-0025,

(Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming.)

6. New York Regional Office, 26 Federal Plaza, Room 3137-A, New York, New York 10278-0022, (New York, Puerto Rico, Virgin Islands, and the following counties in New Jersey: Bergen, Essex, Hudson, Hunterdon, Morris, Passaic, Somerset, Sussex, Union, and Warren.)
7. Philadelphia Regional Office, U.S. Customhouse, Room 501, Second and Chestnut Streets, Philadelphia, Pennsylvania 19106-2904, (Delaware, Pennsylvania, Virginia, except Alexandria (etc), West Virginia, and the following counties in New Jersey: Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, Middlesex, Monmouth, Ocean, and Salem.)
8. St. Louis Regional Office, 911 Washington Avenue, Room 615, St. Louis, Missouri 63101-1203, (Iowa, Kentucky, Missouri, and Tennessee.)
9. San Francisco Regional Office, 525 Market Street, Room 2800, San Francisco, California 94105-2789 (California.)
10. Seattle Regional Office, 915 Second Avenue, Suite 1840, Seattle, Washington 98174-1001, (Alaska, Hawaii, Idaho, Oregon, Washington, and Pacific overseas areas.)
11. Washington Regional Office, 5203 Leesburg Pike, Suite 1109, Falls Church, Virginia 22041-3473, (Washington, DC., Maryland, all overseas areas not otherwise covered, and the following cities and counties in Virginia: Alexandria, Falls Church, Arlington, Fairfax City, Fairfax County, Loudoun, and Prince William.)

### Appendix III to Part 1201—Approved Hearing Locations by Regional Office

#### Atlanta Region

Atlanta, Georgia  
Augusta, Georgia  
Macon, Georgia  
Savannah, Georgia  
Birmingham, Alabama  
Huntsville, Alabama  
Montgomery, Alabama  
Jacksonville, Florida  
Miami, Florida  
Orlando, Florida  
Pensacola, Florida  
Tampa/St. Petersburg, Florida  
Jackson, Mississippi  
Asheville, North Carolina  
Jacksonville, North Carolina  
Raleigh, North Carolina  
Columbia, South Carolina  
Charleston, South Carolina

#### Boston Region

Boston, Massachusetts  
Hartford, Connecticut

New Haven, Connecticut  
Bangor, Maine  
Portland, Maine  
Manchester, New Hampshire  
Portsmouth, New Hampshire  
Providence, Rhode Island  
Burlington, Vermont

#### Chicago Region

Chicago, Illinois  
Davenport, Iowa/Rock Island, Illinois  
Indianapolis, Indiana  
Detroit, Michigan  
Minneapolis/St. Paul, Minnesota  
Cleveland, Ohio  
Cincinnati, Ohio  
Columbus, Ohio  
Dayton, Ohio  
Milwaukee, Wisconsin

#### Dallas Region

Dallas, Texas  
Corpus Christi, Texas  
El Paso, Texas  
Houston, Texas  
San Antonio, Texas  
Temple, Texas  
Texarkana, Texas  
Little Rock, Arkansas  
Alexandria, Louisiana  
New Orleans, Louisiana  
Oklahoma City, Oklahoma  
Tulsa, Oklahoma

#### Denver Region

Denver, Colorado  
Pueblo, Colorado  
Phoenix, Arizona  
Tucson, Arizona  
Wichita, Kansas  
Billings, Montana  
Great Falls, Montana  
Missoula, Montana  
Omaha, Nebraska  
Las Vegas, Nevada  
Reno, Nevada  
Albuquerque, New Mexico  
Bismarck, North Dakota  
Rapid City, South Dakota  
Sioux Falls, South Dakota  
Salt Lake City, Utah  
Casper, Wyoming

#### New York Region

Albany, New York  
New York, New York  
Buffalo, New York  
Syracuse, New York  
Newark, New Jersey

#### Philadelphia Region

Philadelphia, Pennsylvania  
Harrisburg, Pennsylvania  
Pittsburgh, Pennsylvania  
Wilkes-Barre, Pennsylvania  
Trenton, New Jersey  
Dover, Delaware  
Norfolk, Virginia  
Richmond, Virginia  
Roanoke, Virginia  
Charleston, West Virginia  
Morgantown, West Virginia

#### San Francisco Region

San Francisco, California  
Fresno, California  
Los Angeles, California  
Sacramento, California  
San Diego, California



*Seattle Region*

Seattle, Washington  
 Spokane, Washington  
 Richland, Kennewick, and Pasco, Washington  
 Anchorage, Alaska  
 Honolulu, Hawaii  
 Boise, Idaho  
 Pocatello, Idaho  
 Medford, Oregon  
 Portland, Oregon

*St. Louis Region*

St. Louis, Missouri  
 Kansas City, Missouri  
 Springfield, Missouri  
 Des Moines, Iowa  
 Lexington, Kentucky  
 Louisville, Kentucky  
 Knoxville, Tennessee  
 Nashville, Tennessee

*Washington Region*

Bailey's Crossroads, Falls Church, Virginia  
 Washington, DC  
 Baltimore, Maryland

Date: June 29, 1989.

Robert E. Taylor,  
 Clerk of the Board.

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**5 CFR Part 1209**

RIN 3124-AA19

**Practices and Procedures for Appeals of Personnel Actions Allegedly Based on Whistleblowing and Requests for Stays of Personnel Actions in Such Cases**

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The U.S. Merit Systems Protection Board (the Board) is amending its regulations by adding a new part to implement the Whistleblower Protection Act of 1989, Pub. L. 101-12.

**DATES:** Interim regulations effective July 9, 1989; comments must be received on or before September 5, 1989.

**ADDRESS:** Send written comments to Robert E. Taylor, Clerk of the Board, Merit Systems Protection Board, 1120 Vermont Avenue NW., Washington, DC 20419.

**FOR FURTHER INFORMATION CONTACT:** Patricia Price, (202) 653-8919.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Flexibility Act**

The Clerk, Merit Systems Protection Board, certifies that the Board is not required to prepare an initial or final regulatory analysis of this interim rule pursuant to sections 603 and 604 of the

Regulatory Flexibility Act, because of the determination that this regulation would not have significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

**List of Subjects in 5 CFR Part 1209**

Administrative practice and procedure, Government employees.

Accordingly, the Merit Systems Protection Board amends 5 CFR by adding Part 1209 as follows:

**PART 1209: PRACTICES AND PROCEDURES FOR APPEALS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING AND REQUESTS FOR STAYS OF PERSONNEL ACTIONS IN SUCH CASES**

**Subpart A—Jurisdiction and Definitions**

Sec.

- 1209.1 General.
- 1209.2 Jurisdiction.
- 1209.3 Scope.
- 1209.4 Application of 5 CFR Part 1201.
- 1209.5 Definitions.

**Subpart B—Appeals of Personnel Actions Allegedly Based on Whistleblowing**

- 1209.6 Filing of petitions for appeal and responses.
- 1209.7 Content of petition for appeal, request for a hearing.
- 1209.8 Content of agency response.
- 1209.9 Intervention of Special Counsel.
- 1209.10 Attorney fees under 5 U.S.C. 1221(g).
- 1209.11 Burden and degree of proof.
- 1209.12 Time limits for discovery.
- 1209.13 Initial decision.

**Subpart C—Requests for Stays of Personnel Actions**

- 1209.14 Filing of requests for stays of personnel actions and responses.
- 1209.15 Content of stay request and response.
- 1209.16 Hearing and order ruling on stay request.
- 1209.17 Duration of stays, interim compliance.
- 1209.18 Board review of orders granting or denying stays.

**Subpart D—Reports on Applications for Transfers**

- 1209.19 Filing of agency reports.
- Authority: 5 U.S.C. 1204, 1221, and 7701.

**Subpart A—General**

**§ 1209.1 General.**

The Board exercises jurisdiction over appeals authorized by 5 U.S.C. 1221(a). These appeals are known as Individual Right of Action appeals. The Board also has jurisdiction over appeals authorized by any law, rule, or regulation other than 5 U.S.C. 1221(a). Examples of such otherwise appealable actions are

generally listed in 5 CFR 1201.3(a)(1)–(19).

**§ 1209.2 Jurisdiction.**

Subject to 5 U.S.C. 1214(a)(3), the Board has jurisdiction over appeals by an employee, former employee, or applicant for employment with respect to a personnel action taken, proposed, threatened, or not taken because of the individual's whistleblowing activities, as defined in 5 U.S.C. 2302(b)(8). Where it is alleged that a personnel action within the Board's jurisdiction was based on whistleblowing, the Board may also stay the personnel action.

**§ 1209.3 Scope.**

This part governs any appeal where the appellant alleges that a personnel action defined in 5 U.S.C. 2302(a)(2) was threatened, proposed, taken, or not taken because of the individual's whistleblowing activities. Included are Individual Right of Action appeals authorized by 5 U.S.C. 1221(a) and other appealable actions where a law, rule, or regulation authorizes a direct appeal to the Board and the appellant alleges that the agency action was based on his or her whistleblowing activities. Subpart C of this part governs any request for a stay of a personnel action allegedly based on the appellant's whistleblowing activities.

**§ 1209.4 Application of 5 CFR Part 1201.**

Where appropriate and unless provided otherwise, the Board shall apply Subparts A, B, C, E, F, and G of 5 CFR Part 1201 to appeals and stay requests governed by this Part.

**§ 1209.5 Definitions.**

(a) "Personnel action" means, as to individuals and agencies covered by 5 U.S.C. 2302:

- (1) An appointment;
- (2) A promotion;
- (3) An adverse action under Chapter 75 of Title 5, United States Code or other disciplinary or corrective action;
- (4) A detail, transfer, or reassignment;
- (5) A reinstatement;
- (6) A restoration;
- (7) A reemployment;
- (8) A performance evaluation under Chapter 43 of Title 5, United States Code;
- (9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; or
- (10) Any other significant change in duties or responsibilities which is